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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

SHANNON T. DOYLE,
Petitioner,

v.

HYDRO NUCLEAR SERVICES,
Respondent.

On Petition for Writ of *Certiorari* to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF *CERTIORARI*

Stephen M. Kohn
Counsel of Record
David K. Colapinto
Michael D. Kohn
Kohn, Kohn & Colapinto, P.C.
3233 P Street, N.W.
Washington, DC 20007
(202) 342-6980

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QUESTIONS PRESENTED

In this case, the Secretary of Labor interpreted Section 210 of the Energy Reorganization Act of 1974 ("ERA"), as amended, 92 Stat. 2947 (1978), finding that the Petitioner's refusal to sign a pre-employment agreement, which he reasonably believed forced him to prospectively waive his statutory rights, was protected.

In light of the decision below, in which a divided panel of the United States Court of Appeals for the Third Circuit afforded the Secretary's determination no deference and upheld the employer's conditioning Petitioner's employment on his prospective waiver of statutory rights, this case presents the following questions:

1. Whether an employee may be required to prospectively waive substantive rights under the ERA as a condition of employment;

2. Whether the legality of a prospective waiver should be judged from the point of view of a reasonable employee; and

3. Whether the Secretary of Labor's determination, that an employee's refusal to sign a prospective waiver of substantive rights amounts to "protected activity" under the ERA, is entitled to *Chevron*-type deference.

RULE 14(1)(b) LIST OF PARTIES

The parties to the underlying proceeding include: (a) Petitioner, Mr. Shannon Doyle; (b) Respondent, Hydro Nuclear Services, Inc. ("Hydro"), a division of Westinghouse Corp.; and (c) the respondent below, United States Secretary of Labor ("Secretary").

The Petitioner, Mr. Doyle, was the complainant before the Department of Labor in an employment discrimination proceeding against Hydro under the nuclear whistleblower protection law, Section 210 of the ERA. After the Department of Labor Administrative Review Board ("ARB") found Hydro liable for violating the ERA and awarded Mr. Doyle over $787,000 in costs and damages, Hydro petitioned the United States Court of Appeals for the Third Circuit for review of the ARB's decision and order. Mr. Doyle intervened in Hydro's appeal, and cross-petitioned, on a damages calculation issue. The two petitions for review were consolidated before the Third Circuit.

The United States Secretary of Labor, the respondent before the Third Circuit in the Hydro appeal, is charged by Congress with oversight of the employee protection provisions of the ERA, including Section 210. As such, the Secretary had jurisdiction over Mr. Doyle's employment discrimination proceeding in the Department of Labor, where it awarded Mr. Doyle damages for Hydro's violation of Section 210. When Hydro petitioned for review of the Secretary's order, the Secretary of Labor became a respondent before the United States Court of Appeals for the Third Circuit.

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OPINIONS BELOW

The Petitioner in this case, Mr. Doyle, was the prevailing complainant in an ERA Section 210 employment discrimination action before the U.S. Department of Labor ("DOL") against Hydro Nuclear Services ("Hydro"). In that proceeding, the Secretary of Labor issued an order, on March 30, 1994, finding that Mr. Doyle engaged in protected activity under Section 210 when he refused to sign a pre-employment agreement which would have forced him to waive his right to later file a complaint of illegal blacklisting under the ERA. The Secretary's decision is reproduced in the Appendix ("A") hereto, at A29.[1/]

On March 27, 2002, the Third Circuit granted Hydro's petition for review, finding that the Secretary's decision regarding the legality of the prospective waiver was entitled to no deference. The Third Circuit vacated the rulings of the Secretary of Labor and dismissed all of Doyle's claims. The Third Circuit's decision is reproduced at A1.

1/ Between 1994-2000 the claim was further adjudicated before the DOL in order to determine the appropriate scope of relief. On May 17, 2000 the DOL issued its final decision in the case, awarding Mr. Doyle over $787,000 in damages and costs. Hydro did not appeal the damages ruling, and these rulings are not at issue in this Petition. Instead Hydro only challenged the liability determination issued on March 30, 1994. A3.

STATEMENT OF JURISDICTION

This is a Petition for a Writ of *Certiorari* from a March 27, 2002 decision of the United States Court of Appeals for the Third Circuit. Mr. Doyle filed a timely petition for *en banc* rehearing, and the Third Circuit denied Mr. Doyle's petition on May 30, 2002.

This Petition is filed within 90 days of the Third Circuit's denial of rehearing and rehearing *en banc*. As such, it is timely pursuant to Sup. Ct. R. 13.1, and the Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

This case involves Section 210 of the Energy Reorganization Act of 1974, as amended, 92 Stat. 2947 (1978). Section 210 was formerly codified at 42 U.S.C. § 5851, and is reproduced in the Appendix at A47. [2/]

[2/] Congress amended Section 210 in 1992, and Section 210 was re-designated Section 211. The 1992 amendments did not alter those portions of former Section 210 that are relevant to this case and, after the 1992 amendment, the issues presented in this case may still arise under the new Section 211. As Judge Bright noted in his dissent, below, the Third Circuit's ruling has widespread implications and may impact nearly every employment discrimination law. *See* A23 ("I would reject this release not just as a violation of Mr. Doyle's ERA rights, but as a violation of all employees' rights. Anyone signing this release could be left with the impression that they have waived their right to bring a retaliation suit against Hydro or any past employer") (emphasis supplied).

STATEMENT OF THE CASE

A. Mr. Doyle's Underlying ERA Claim.

Shannon Doyle worked in the nuclear industry as a radiation decontamination technician. Mr. Doyle "blew the whistle" on a radiological safety hazard at Alabama Power Company's Farley nuclear generating station. He also testified before the NRC on this safety concern.

After his whistleblower incident at Farley, Mr. Doyle filed a discrimination claim against Alabama Power. That case was dismissed pursuant to the ERA's 30-day statute of limitations which was in effect at the time. *See Doyle v. Alabama Power Co.*, 1989 WL 549893 (Sec'y. Sept. 29, 1989). After his employment with Alabama Power ended, Mr. Doyle found it very difficult to find work within the nuclear industry. A55. Eventually, Mr. Doyle applied to Hydro in the fall of 1988 to work as a senior decontamination technician during a planned refueling outage at the D.C. Cook nuclear generating plant in Bridgeman, Michigan. A3-A4.

Hydro agreed to hire Mr. Doyle and Doyle arrived at Bridgeman on November 7, 1988, to finalize the employment application process. As part of this Doyle was asked to execute a variety of pre-employment waivers, including two releases which permitted past employers to reveal to Hydro details of Mr. Doyle's employment history. A44 (ALJ, acknowledging other releases). These releases did not contain any prospective waivers of Mr. Doyle's ERA rights and Doyle executed all of the required paperwork.

However, because of a delay in processing Mr. Doyle's application, Doyle expressed a concern to Mr. Dan Haynes, a Hydro official, regarding potential blacklisting, and informed Haynes that he would have "no choice but to file a complaint with the DOL" if he suspected blacklisting. A53.[3/]

After Mr. Doyle raised his concerns about the potential blacklisting Hydro proffered to him a new pre-employment waiver. This waiver contained a prospective release of Mr. Doyle's substantive rights under various employment laws. As Doyle understood it, the new waiver would have released both Hydro and Alabama Power Company from any future claim of intentional discrimination under the ERA based on the impact of any negative reference provided by Alabama Power. In relevant part, the agreement stated:

> Further, I hereby release and discharge Hydro Nuclear Services, their representatives, and their clients for whom the investigation is being performed and any organization listed above furnishing or receiving any information pertaining to me from any and all liability or claim as results (*sic*) of furnishing or receiving such information pursuant to this authorization.

[3/] Significantly, pursuant to Department of Labor regulations implementing the ERA, an employee who is "about to" file an ERA claim related to "blacklisting" has engaged in protected activity thereunder. *See, e.g.* 29 C.F.R. § 24.2(b)(1).

A45 (the entire release is reproduced in the Appendix).

Mr. Doyle was extremely concerned that he would be blacklisted in the nuclear industry due to his prior whistleblowing activity. He refused to sign the agreement, as written, and instead crossed out the prospective waiver language before signing. A14-A15.

After objecting to the prospective release of claims, Mr. Doyle was directed to contact Hydro's manager of employee relations, Mr. Booker. The parties entered a factual stipulation regarding the conversation between Mr. Doyle and Hydro's manager:

> Later that day, Mr. Doyle spoke with Robert Booker to express his reluctance to sign the authorization form. Mr. Doyle stated that he would sign it provided the second paragraph was deleted or amended to retain his rights under the Energy Reorganization Act. Mr. Booker told Mr. Doyle that, unless he signed the release form in its entirety, HNS would cease any consideration of employing him. When speaking to Mr. Booker, Mr. Doyle mentioned a previous whistleblower incident in which he was involved.

A41-A42.

As stipulated between the parties, Mr. Doyle informed Mr. Booker of his prior whistleblowing activity and requested that Hydro modify the waiver to remove the prospective waiver. Hydro refused to modify its form.

When Mr. Doyle still refused to sign the prospective waiver, Hydro informed him that it would no longer consider him a candidate and refused to hire him. *Id.*[4/]

After refusing to hire Mr. Doyle, Hydro reported to a credit agency that Mr. Doyle had been "denied access" to a nuclear facility. It is undisputed on the administrative record that Hydro's refusal to hire and report to the credit agency caused Mr. Doyle and his family "devastating," "psychological, emotional and financial" harm. *See, e.g.* A25 (Bright, J., dissenting).

B. Procedural History.

Proceeding *pro se*, Mr. Doyle filed a complaint against Hydro on December 9, 1988, alleging that Hydro's refusal to hire him (for his refusal to sign a prospective waiver of his rights as a nuclear whistlebower) constituted a violation of the employee protection provisions of Section 210 of the ERA.

[4/] Hydro failed to demonstrate in the administrative proceeding before the Department of Labor that it ever proffered a similar prospective waiver to other employment candidates. While Hydro attempted to make this point by proffering a self-serving and untested letter to the Third Circuit, the court below denied Hydro's motion to supplement the administrative record in such a way and the letter in question was not placed on-the-record. *See Doyle v. Sec'y. of Labor*, Nos. 00-1589 and 00-2035, Order (3d Cir. March 27, 2002). Hydro had never attempted to place the letter on-the-record during the administrative proceeding.

The DOL's Wage and Hour Division and Office of Administrative Law Judges ("OALJ") initially denied Mr. Doyle's ERA claim. A38 (ALJ decision). However, the parties stipulated to certain facts during the OALJ proceeding and the case was heard by the Secretary of Labor on the basis of the stipulated record. In a March 30, 1994 Final Decision and Order, the Secretary found that Hydro had:

> violated the ERA when it refused to hire [Mr. Doyle] because he refused to sign the authorization form unless the release of liability paragraph was deleted.

A35.

The Secretary referred to several of this Court's decisions, including *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945) and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), for the proposition that it was unlawful under statutes analogous to the ERA to require a prospective waiver of substantive rights. A32-A33.

As such, the Secretary found that Hydro's proffered prospective waiver was unlawful under the ERA. Specifically, the Secretary noted that, if enforced, Hydro's waiver would destroy the ERA's remedial purpose of protecting employees, would chill the speech of whistleblowers and, ultimately, would jeopardize the public health and safety. The Secretary stated:

> Requiring complainant to choose between a job and his rights under the ERA would be

> equally as destructive of Congressional intent as the waiver in *Brooklyn Bank v. O'Neil*. Employers could refuse to hire those who will not waive their rights and hire only those who are willing to waive their right to complain of retaliation. Such employees may reasonably believe they have no protection under the ERA and will be afraid to speak out about safety problems.

A34.

Moreover, the Secretary made clear that the proffered prospective waiver was completely unnecessary and had no place under the ERA. In fact, Hydro's only proffered reason for Doyle's termination was wholly inadequate because Hydro could have proceeded with the background screening, without insisting upon the waiver:

> Respondent asserts that 'the employer should be able to protect itself against any claim arising out of the innocent, but necessary, provision or receipt of information.' But Respondent has not explained why, under the ERA and its regulations it should be able to shield itself from the anti-retaliation provisions of the Act. If Respondent 'innocently,' *i.e.*, in good faith, refuses to hire an applicant based on derogatory information supplied by another employer, the other employer may be held liable for blacklisting but not the Respondent.

> However, if Respondent refused to hire an applicant because he filed a complaint with the NRC against another employer, *such a clear violation of the ERA* and the regulations would be immunized if this release were allowed to stand. Moreover, the release would immunize other employers who might, because of a retaliatory motive, provide Respondent false or misleading information about Complainant.
>
> I find that Respondent violated the ERA when it refused to hire Complainant because he refused to sign the authorization form unless the release of liability paragraph was deleted.

A35 (emphasis supplied).

After the Secretary issued his March 30, 1994 determination on liability, Hydro and Doyle participated in extensive proceedings related to calculating the amount of damages owed in this case. Hydro did not appeal any of the damage determinations, and after a final ruling on damages was entered, Hydro only petitioned for a review of the March 30, 1994 liability ruling.[5/]

[5/] On May 18, 2000, Hydro petitioned the United States Court of Appeals for the Sixth Circuit for review of the DOL's final order. On May 19, 2000, Mr. Doyle petitioned the United States Court of Appeals for the Third Circuit for review of the DOL's final order solely as it related to the damages

(continued...)

On March 27, 2002, the Third Circuit, in a split 2-1 ruling, granted Hydro's petition and vacated the SOL's order finding Hydro liable under the ERA.

In its decision, the divided panel reversed the SOL's liability determination on the grounds that "Doyle did not engage in protected activity when he refused to sign" the prospective waiver proffered to him by Hydro as a condition of his employment. A17. The panel based this finding on a determination that Hydro's waiver was not legally enforceable as to blacklisting and, as such, Mr. Doyle's subjective belief as to the force and effect of the waiver was irrelevant.

Thus, despite the fact that the waiver expressly stated that it was a release from "any and all liability or claims" arising out of the furnishing or receipt of information thereunder, the panel found that the release did not relate to blacklisting. As such, the panel completely overturned the Secretary's express finding, set forth *supra*, that the release did purport to immunize Hydro from liability for blacklisting or failure to hire claims under the ERA. In so doing, the panel stated that is saw "no reason" to defer to the Secretary's construction of the pre-employment agreement. A17.

[5/](...continued)
calculation. A3. On June 5, 2000 the Judicial Panel on Multidistrict Litigation ordered the petitions consolidated in the Third Circuit, and Hydro's petition was duly transferred thereto. Doyle's petition concerning the amount of damages was denied as moot after the Third Circuit granted Hydro's petition.

The crux of the panel's argument on this issue focused solely on what it perceived to be a contract interpretation question. To wit, the panel held that the Secretary misconstrued Hydro's proffered waiver and failed to recognize the "well-recognized principle of law" that ambiguous documents "should not be deemed illegal where capable of construction that will validate them." A16.

As a result of its conclusion that Hydro's proffered waiver did not purport to cover blacklisting, and would not have been enforceable had Mr. Doyle brought a blacklisting claim, the panel then held that:

> Doyle simply was not engaged in protected activity when he refused to sign the authorization with the release. Thus Hydro must prevail in these proceedings.

A17.

In a dissenting opinion, Judge Bright argued that the panel's logic was misplaced, as "this case is not about contract law. It is about statutory interpretation." A22. In a very concise manner, Judge Bright noted the apparent flaw in the panel's reasoning:

> On its face, Hydro's waiver can be read to release former employers as well as putative employers from liability. This is how Mr. Doyle, a lay person unrepresented by counsel, read the release during his pre-employment screening, and it is likely how a lay person in the same situation would understand the

> release language. *The legal insufficiency of the waiver is immaterial* because an ordinary reader would not know that the waiver could not be used by the employer as a defense to a retaliation claim.

A23.

Judge Bright also recognized the broad implications of the panel's holding, and that the Third Circuit's legalization of Hydro-type waivers threatened to undermine all employment discrimination laws, not just the ERA:

> I would reject this release not just as a violation of Mr. Doyle's ERA rights, but as a violation of all employees' rights. Anyone signing this release could be left with the impression that they have waived their right to bring a retaliation suit against Hydro or any past employer. This impression would chill the employee's inclination to report safety issues to the proper regulatory authorities. Under this scenario, Congress' goal of making the nuclear industry safer by protecting potential whistleblowers is fundamentally undermined.

A23.

Further, Judge Bright lamented that the majority ruling created a "grave injustice" to Mr. Doyle and undermined nuclear safety:

> In this case, we have done a grave injustice to Mr. Doyle, a man who was blacklisted from his chosen line of work for attempting to preserve his rights under a federal statute. We have upheld an employer's ability to make its employees uncertain about the status of their nuclear whistleblower rights. We have thereby dealt a blow to the safety of the nuclear industry.

A25.

Mr. Doyle timely petitioned the Third Circuit for *en banc* review of the panel decision. Mr. Doyle's petition was denied on May 30, 2002, *see* A27, and Mr. Doyle now brings this Petition for Writ of *Certiorari*.

REASONS FOR GRANTING THE PETITION

The Third Circuit's decision, which Judge Bright noted in his dissent, not only dealt a severe "blow to the safety of the nuclear industry" and served a "grave injustice" upon Mr. Doyle, it also violates "all employees' rights" beyond the statute at issue in this case.

The decision below upheld the legality of a prospective waiver which Mr. Doyle believed required him to waive his substantive rights under the ERA. Sustaining the prospective waiver at issue in this case interferes with this Court's construction of employment agreements and undermines the careful balance between procedural and substantive rights set forth by the Court in a line of decisions running from *Brooklyn Savings Bank* through *Circuit City*.

This Court should now grant this Petition, because the prospective waiver legalized by the Third Circuit creates a division among the Courts of Appeals and raises exceedingly important questions this Court should review.

I. THE PROSPECTIVE WAIVER LEGALIZED BELOW CREATES A DIVISION AMONG THE CIRCUITS AND CONFLICTS WITH THE PRIOR DECISIONS OF THIS COURT.

The Third Circuit ruling conflicts with rulings of this Court and of the U.S. Courts of Appeal for the District of Columbia, Second, Seventh and Eight Circuits, which clearly hold that it is impermissible to require employees to waive substantive employment rights as a condition of employment. The panel's holding creates a division among the circuits, in the following four ways.

First, the Third Circuit is now the only circuit to uphold the legality of a prospective waiver of substantive statutory rights.

Second, the Third Circuit's decision creates a clear and unmistakable direct conflict with the United States Court of Appeals for the Eighth Circuit, with respect to whether an employer may terminate an employee over the employee's objection to a term of employment which the employee reasonably believes is illegal. It also conflicts with similar holdings of the District of Columbia, Second and Seventh Circuits.

Third, the panel's decision creates a division among the circuits as to whether, under the ERA, an employee can

even be asked to relinquish his or her rights.

Finally, the Third Circuit's decision creates a division among the circuits as to whether the Secretary of Labor's "scope of protected activity" determination under the ERA is entitled to deference under *Chevron v. Natural Resources Defense Council, Inc*, 467 U.S. 837 (1984) and its progeny.

A. Prospective Waiver of Substantive Rights.

This Court has repeatedly held that it is unlawful for an employer to require a prospective employee to prospectively waive substantive statutory rights as a condition of employment. *See, e.g. Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974) (no prospective waiver of Title VII rights); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (no prospective waiver of "substantive" rights).

This long-standing prohibition against forcing an employee to waive substantive rights as a condition of employment has been a bedrock of the Court's employment decisions. *See Brooklyn Svgs. Bank v. O'Neil*, 324 U.S. 697, 707 (1945) ("no one can doubt" that permitting a "waiver" of a "statutory" right would "nullify the purposes" of the law). For example, in his dissenting opinion in *Barrentine*, Chief Justice Burger reiterated the importance of the prohibition. The Chief Justice stated that "of course" a "congressionally-created right" of workers "may not be waived" through an "agreement between an individual worker and the employer." *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 746 (1981) (Burger,

C.J., dissenting).

As a result of this sound rule, it is now well-established that an employee may only be required to waive procedural rights, and this Court has been very careful to ensure that pre-employment waivers do not extend beyond permissible procedural waivers. *See, e.g. Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

The Third Circuit's decision in this case threatens to blur the carefully-crafted line between substantive and procedural waivers. For, under its new precedent, any employer is now permitted to include in any pre-employment agreement a prospective waiver from "all liability or claim" arising out of either the employer's or a former employer's "furnishing or receiving" information pursuant to the agreement. *See* A45.

This new rule thus gives employers broad license to intentionally discriminate against employees, by either blacklisting or refusing to hire them.

B. Clear and Unequivocal Split Among the Circuits.

The Third Circuit in this case held that the legality of a prospective waiver should be judged on an objective, judicial basis of whether it would ultimately be enforceable, rather than on a subjective basis of whether a reasonable employee would believe the waiver to be enforceable. As such, it conflicts with decisions of other Courts of Appeals. *See, e.g. Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975).

To wit, the Secretary's relevant determination in this case was whether or not Mr. Doyle engaged in protected activity under the ERA when he refused to sign Hydro's proffered agreement. The Secretary expressly noted that it is immaterial whether the waiver at issue is legally enforceable, and held that whether an employee has engaged in protected activity is a matter of the employee' subjective state of mind:

> Requiring complainant to choose between a job and his rights under the ERA would be equally as destructive of Congressional intent as the waiver in *Brooklyn Bank v. O'Neil.* Employers could refuse to hire those who will not waive their rights and hire only those who are willing to waive their right to complain of retaliation. *Such employees may reasonably believe they have no protection under the ERA and will be afraid to speak out about safety problems.*

A34 (emphasis supplied).

As such, it is clear that the Secretary did not rest his decision on an interpretation of Hydro's proffered agreement, but rather on the interpretation that, under the ERA, if an employee <u>believes</u> that he is being asked to prospectively waive his rights and refuses to do so, that <u>refusal</u> is protected activity – regardless of whether the proffered agreement is legally enforceable or not.[6/]

[6/] The Secretary's determination thus goes to (continued...)

The Third Circuit disagreed, and based its decision on the question of whether the prospective waiver would ultimately be found by a court to be enforceable. The panel stated that the Secretary:

> determined that by signing the release Doyle would have waived his right to file a complaint of illegal blacklisting under the ERA. Consequently he concluded that the waiver – as so construed – violated the ERA because it created an impermissible Hobson's Choice between employment and the reporting of safety hazards. As such, Doyle's refusal to sign constituted protected activity as the release could not be used lawfully to waive his right.

A15-A16.

Despite the fact that the waiver expressly stated that it was a release from "any and all liability or claims" arising out of the furnishing or receipt of information about Mr. Doyle, the panel found that the waiver did not cover

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[6/](...continued)
whether the waiver is likely to chill employees' protected activity in the future. This determination coincides with the Courts of Appeals which have noted that, when reviewing "protected activity" under the federal anti-discrimination laws, the focus should be on "the effect of discrimination against employees who pursue their federal rights, not the motivation of the employer who discriminates ." *See E.E.O.C. v. Bd. of Governors*, 957 F.2d 424, 427 (7th Cir. 1992).

blacklisting or refusal to hire claims, and that it could not do so, in light of the "well-recognized principle of law requiring that ambiguous documents should not be deemed illegal where capable of constructions that will validate them."

A16.

Thus, the Third Circuit ruled directly contrary to the Secretary, and held that an employee's reasonable belief is immaterial. According to the Third Circuit, employees who believe they are being asked to waive their rights are not protected, and the only relevant question is whether a court, at some later time, would find the proffered waiver to be enforceable.

This approach – focusing on the objective, judicial construction given to the waiver – directly and unequivocally conflicts with other Courts of Appeals' rulings, which use a "reasonable employee" standard.

For example, in *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975), the Eighth Circuit held that where the "immediate cause" or "motivating factor" of an employee's discharge is the fact that the employee asserted his or her statutory rights, the discharge is *per se* discriminatory.

In *Brennan*, which arose under the Fair Labor Standards Act ("FLSA"), an employee believed that her employer had engaged in unlawful conduct under the FLSA. The employee "protested" the employer's conduct, "asserted" her "statutory" rights, and refused to sign an

agreement as a result of the employer's conduct. On review, the Eight Circuit stated that the employee's

> reasonable belief was caused entirely by Maxey's conduct and her lawful assertion of rights based on that belief must be protected. To hold otherwise would defeat the Act's purpose . . . of preventing employees' attempts to secure their rights under the Act from taking on the character of a 'calculated risk.'

Brennan, 513 F.2d at 181.

Like the employee in *Brennan*, Mr. Doyle reasonably believed that Hydro's proffered waiver was unlawful under the ERA. *See* A23 (Bright, J., discussing "ordinary reader" of waiver). Like the employee in *Brennan*, Mr. Doyle protested Hydro's conduct, asserted his rights under the ERA, and refused to sign the agreement. *See* A40-A42 (parties' stipulations). Like the employer in *Brennan*, Hydro terminated Mr. Doyle's employment.

Unlike the Eighth Circuit in *Brennan*, the Third Circuit in this case held that Mr. Doyle was not protected when he lawfully asserted his rights because he reasonably believed Hydro's proffered waiver to be unlawful under the ERA. In order to protect all employees, *see* A23-A24 (Bright, J.), this Court should grant *certiorari* and reverse the Third Circuit's decision.

In addition, the Third Circuit's decision conflicts with decisions of other Courts of Appeals on the issue of

whether an employer can make an offer of employment contingent upon the employee's willingness to waive his substantive rights under the law governing his particular workplace.

For example, in *Secretary of Labor, ex rel. Keene v. Mullins*, 888 F.2d 1448 (D.C. Cir. 1989), the District of Columbia Circuit held that an employment offer which required the employee to prospectively waive the substantive statutory protections of the Mine Safety and Health Act ("MSHA") was unlawful.

In *Mullins*, the S&M Coal Company was found to have unlawfully discharged a mining electrician, when it fired him for refusing to re-wire electrical equipment so the equipment would bypass safety features. After the electrician filed a complaint with the Mine Safety and Health Administration, the company offered him a position, on the condition that he agree to prospectively waive his substantive rights and "engage in unlawful and hazardous activity" as defined by the MSHA. *See* 888 F.2d at 1450.

On review of the Secretary's decision finding the prospective waiver to be unlawful, the District of Columbia Circuit squarely held that the company's offer to re-employ the electrician "under illegal and dangerous conditions transgresses the clear prohibitions" of the MSHA. 888 F.2d at 1451. Accordingly, the court found that the prospective waiver of substantive rights in that case was unlawful under the MSHA.

Mullins is very similar to this case. Like the electrician in *Mullins*, Mr. Doyle was offered employment

on the condition that he agree to forego his substantive statutory rights. The District of Columbia Circuit in *Mullins* protected the employee in that case, and upheld Congress' clearly-stated intent in enacting the employment discrimination provision in question. The Third Circuit in this case did not. As a result, employers will now be able to proffer agreements that require an employee to waive substantive rights, and employees will never find shelter in those rights until – possibly years later – a court rules upon whether the waiver is enforceable. Because this threatens not just workers in the nuclear industry, but "all employees," *see* A23-24, this Court should grant *certiorari* and reverse the Third Circuit.

Finally, the Third Circuit's decision in this case blatantly conflicts with the Second Circuit's rule, which holds that it is "protected activity" for an employee to refuse to sign an agreement he reasonably believes to be unlawful, and that it is illegal under the ERA for an employer to even proffer such an agreement.

In *Connecticut Light & Power Co. v. Secretary of Labor*, 85 F.3d 89 (2d Cir. 1996) ("*CL&P*"), the employee of a sub-contractor for a nuclear utility was terminated. The employee then complained to the NRC's resident inspector, and brought an action in state court against his employer. While the employee's case was in litigation, he entered into settlement negotiations with his former employer. The employer proposed a settlement agreement which "would have restricted" the employee's "ability to provide regulatory agencies with information" concerning either the employer or the contracting utility. *CL&P*, 85 F.3d at 91.

The employee's counsel informed the former employer that he was concerned over the restrictive language, and provided the employer with an edited version of the settlement agreement, which had removed the restrictive terms. As a result, the employer terminated settlement negotiations with the employee. 85 F.3d at 92.

The employee then filed a complaint under the ERA, alleging that, as a result of his complaints to the NRC and his wrongful termination action, the employer had proffered a settlement agreement containing unlawful provisions. *Id.* In the employee's ERA case, the Secretary of Labor found that the employer violated the ERA and that it was unlawful for the employer to even proffer to the employee an agreement which asked him to prospectively waive his rights, as "relinquishing these rights in exchange for financial considerations would be illegal and contrary to public policy." *CL&P.*, 85 F.3d at 95.

On review, the Second Circuit agreed with the Secretary. The court rejected the employer's argument that proffering the unlawful agreement could not of itself be illegal, since the employee was free to simply reject the proffer – an argument which is conceptually similar to the Third Circuit's analysis in this case. In so doing, the Second Circuit cited *Mullins*, *see supra*, and stated that:

> This characterization of adverse action not only oversimplifies the subtle, implicit, discriminatory action, but is contrary to the expansive scope of the ERA. Although the act of inducing an employee to relinquish his rights as provided by the ERA through means

> of a settlement agreement is less obvious than more direct action, such as termination, it is certainly aimed at the same objective: keeping an employee quiet.

CL&P., 85 F.3d at 95.

Thus, the Second Circuit upheld the Secretary's interpretation of the ERA, and found it illegal for an employer to even proffer to an employee an agreement which would require the employee to prospectively waive his or her ERA rights.

The Third Circuit's decision in this case directly conflicts with *CL&P*, because not only did Hydro proffer what Mr. Doyle believed to be an unlawful prospective waiver, it actually refused to hire him for refusing to agree to it. For the Third Circuit to find that Hydro's actions were legal – and that Mr. Doyle had not engaged in protected activity – runs directly counter to the Second Circuit's holding in *CL&P*.

C. Deference to the Secretary's Determination.

In addition to the conflicts created by the Third Circuit upholding the prospective waiver in this case, its decision also conflicted with those of other Courts of Appeals which have deferred to the Secretary's "scope of protected activity" determinations under the ERA.

As set forth, *supra*, the Secretary in this case clearly found that Mr. Doyle engaged in protected activity by refusing to sign Hydro's prospective waiver. A34-A35.

As such, it is clear that the Secretary interpreted the ERA to find that, if an employee reasonably believes that he is being asked to prospectively waive his rights and refuses to do so, that refusal is protected activity, regardless of whether the proffered agreement is legally enforceable or not.

This determination by the Secretary was a "scope of protected activity" determination, under the ERA, which other Courts of Appeals have held is a determination that is entitled to substantial, *Chevron*-type deference. *See, e.g. Stone & Webster Eng. Corp. v. Herman*, 115 F.3d 1568, 1575 (11th Cir. 1997) (noting that Secretary's scope of protected activity determination under ERA is "accorded due deference"); *Bechtel Const. Co. v. Sec'y. of Labor*, 50 F.3d 926, 932 (11th Cir. 1995) (applying *Chevron* deference analysis to Secretary's determination that internal complaints are protected); *Lockert v. Dep't. of Labor*, 867 F.2d 513, 518 (9th Cir. 1989) ("our review of the Secretary's decision regarding scope of protected activity is deferential"); *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505, 1509-1511 (10th Cir. 1985) (affording *Chevron*-type deference to Secretary's determination that internal reporting is "protected activity").

As the panel below completely refused to grant the Secretary's "scope of protected activity" determination in this case any deference, *see* A17, the decision squarely conflicts with the decisions of other Courts of Appeals, which defer to the Secretary's determinations of this type.

For the foregoing reasons, the Third Circuit decision in this case conflicts with the decisions of other Courts of Appeals, and this Court should grant *certiorari* in order

harmonize the conflicts.

II. THE PROSPECTIVE WAIVER LEGALIZED BELOW PRESENTS EXCEEDINGLY IMPORTANT QUESTIONS.

The Third Circuit's error in this case is no minor issue, and the Court should grant *certiorari* because it also raises important questions which have far-reaching implications. If followed, the Third Circuit's ruling threatens to undermine the integrity of this Court's long line of cases concerning the permissible scope of pre-employment waivers and create an incentive for employers to include improper prospective waivers in otherwise permissible pre-employment agreements.

The Third Circuit's legalization of the prospective waiver in this case blurs the distinction between acceptable agreements, which waive procedural rights in the name of the common good, and unlawful agreements, which waive substantive rights and which this Court has consistently held to be unlawful. This blurred distinction will not only affect employment relationships in the nuclear industry, but will also affect all pre-employment agreements, including pre-employment agreements containing arbitration provisions, which this Court has consistently held are in the public interest.

The Third Circuit's prospective waiver rule will have far-reaching and detrimental results with respect to pre-employment agreements, because it misses the distinction between substantive and procedural rights. As such, it allows employers to create agreements that the courts will

ultimately find to be partially invalid. This will result in challenges to the legality of an entire pre-employment agreement, and will undermine public confidence in the pre-employment agreement process itself.

Worse, the increased litigation over waivers of this type will totally vitiate the benefits contained in straight-forward pre-employment agreements like those at issue in *Circuit City v. Adams*. As Justice Kennedy noted there, proper pre-employment agreements minimize the costs of litigation, eliminate "difficult choice-of-law questions," and reduce the complexity and uncertainty of the employer-employee relationship. *See, e.g. Circuit City*, 532 U.S. at 123. Significantly, in order to be a "proper" agreement, Justice Kennedy noted that it must not force an employee to "forego" "substantive rights." *Id.*

Moreover, the Third Circuit's rule will have a devastating impact on legitimate, protected activity by employees. Until the waiver is ultimately determined to be unenforceable by a court, untold numbers of employees who may not be aware that the waiver is unenforceable will believe that it is and will thus remain quiet because they perceive a lack of recourse should an employer blacklist them, fail to hire them, or otherwise retaliate against them.

If they are required, as a condition of employment, to sign an agreement like the one Hydro proffered to Mr. Doyle, many, if not most, employees will <u>believe</u> that they have waived the right to bring a claim against their employer or anyone else who blacklists or refuses to hire them. As Judge Bright noted in his dissent:

> The legal sufficiency of the waiver is immaterial because an ordinary reader would not know that the waiver could not be used by the employer as a defense to a retaliation claim.

A23.

It is of absolutely no consolation that such an agreement might actually be deemed invalid at some later date by a court, when the effect of the agreement on employees who are a party to it are afraid to report health and safety concerns.

The likelihood that the Third Circuit's prospective waiver in this case will silence employees runs directly counter to the purpose of "whistleblower provisions," which even the Third Circuit itself has acknowledged are:

> intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment.

See, e.g. Passaic Valley Sewerage v. Dep't. of Labor, 992 F.2d 474, 478 (3d Cir. 1993).

Finally, the Third Circuit ignored the NRC's independent condemnation of Hydro's practice. Although the Department of Labor has jurisdiction over nuclear whistleblowing, Congress vested in the NRC independent

jurisdiction to punish retaliation against a whistleblower which impacts public health and safety. *See United States v. Construction Products*, 73 F.3d 464, 471-72 (2d Cir. 1996) (explaining NRC authority in nuclear whistleblowing matters).

The NRC reviewed the administrative record in this case, and determined that the Hydro waiver, unto itself, threatened the public health and safety, in violation of nuclear safety law, because of the chilling effect it would have on employees like Shannon Doyle. As such, the NRC issued a Notice of Violation against Hydro, condemning the Hydro waiver as "contrary" to Section 210. A57. The Third Circuit's rule completely ignores this threat, which waivers like the one here exacerbate, not only in the nuclear industry but in all industries regulated by employee-protection laws.

For these reasons, the Third Circuit's prospective waiver in this case raises important questions which this Court should resolve.

III. THE PROSPECTIVE WAIVER LEGALIZED BELOW WORKS A GRAVE INJUSTICE.

In his dissenting opinion, Judge Bright noted that Hydro's prospective waiver should be rejected as a violation of not just Mr. Doyle's rights, but of all employees' rights, and that the Third Circuit's legalization of that waiver worked a "grave injustice" upon Mr. Doyle while at the same time it "dealt a blow to the safety of the nuclear industry." A25.

The Third Circuit's approach in this case, which

ignored the potential harm to public health and safety, is particularly inappropriate because it allows employers to accomplish by facially innocuous means what it could not otherwise do under the ERA: silence employees. As the Second Circuit has stated in an analogous context:

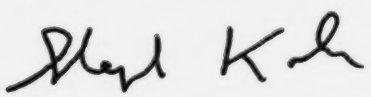
> inducing an employee to relinquish his rights as provided by the ERA through means of a settlement agreement is less obvious than more direct action, such as termination, it is certainly aimed at the same objective: keeping an employee quiet.

CL&P, 85 F.3d at 95.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Doyle's Petition for Writ of *Certiorari*.

Respectfully submitted,



Stephen M. Kohn
Counsel of Record
David K. Colapinto
Michael D. Kohn
Kohn, Kohn & Colapinto, P.C.
3233 P Street, N.W.
Washington, DC 20007
(202) 342-6980

United States Court of Appeals,
Third Circuit.

Shannon T. DOYLE, Petitioner,
v.
U.S. SECRETARY OF LABOR and U.S. Department of Labor Administrative Review Board, Respondents.
Hydro Nuclear Services, Inc., Petitioner,
v.
The Secretary of Labor, Administrative Review Board, and The United States Department of Labor, Respondents.

Nos. 00-1589, 00-2035.

Argued Jan. 15, 2002.
Filed March 27, 2002.

Nuclear decontamination corporation petitioned for review of order of Secretary of Labor finding that corporation violated Energy Reorganization Act (ERA) in failing to hire applicant, and of order of Administrative Review Board (ARB) awarding damages. The Court of Appeals, Greenberg, Circuit Judge, held that: (1) burden-shifting paradigm would be applied to claim filed under ERA's anti-retaliation provision prior to effective date of amendment incorporating such paradigm; (2) applicant did not engage in protected activity when he refused to sign release-of-liability provision; and (3) corporation's proffered reason for refusing to hire applicant unless he signed release was not pretextual.
Petition granted; orders set aside.

Retaliation in violation of the Energy Reorganization Act (ERA) does not occur unwittingly and, therefore, a finding of liability requires an inquiry into the employer's state of mind to prove that the employer subjectively intended to discriminate against the employee on account of his engagement in a protected activity. Energy Reorganization Act of 1974, § 211(a), as amended, 42 U.S.C.A. § 5851(a).
*244 Stephen M. Kohn (argued), Kohn, Kohn & Colapinto, Washington, DC, for Petitioner in No. 00-1589 and Intervenor in No. 00-2035.

*245 Peter Buscemi (argued), Thomas A. Schmutz, David R. Lipson, Morgan, Lewis & Bockius, Washington, DC, Glen R. Stuart, Morgan, Lewis & Bockius, Philadelphia, PA, Hope A. Comisky, Michael H. Rosenthal , Pepper Hamilton, Philadelphia, PA, for Petitioner in No. 00-2035.

Howard M. Radzely, Acting Solicitor of Labor, Steven J. Mandel, Associate Solicitor, Paul L. Frieden, Lois R. Zuckerman, (argued), Office of the Solicitor, United States Department of Labor, Washington, DC, for Respondents.

BEFORE: SCIRICA, GREENBERG, and BRIGHT, [FN*] Circuit Judges.

FN* The Honorable Myron H. Bright, Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

OPINION OF THE COURT

GREENBERG, Circuit Judge.

These matters come on before this court on consolidated petitions for review of a May 17, 2000 Final Decision and

Order issued by the Administrative Review Board ("ARB") acting on behalf of the United States Secretary of Labor and United States Department of Labor, and of a March 30, 1994 Final Decision and Order of the Secretary. The Secretary's decision and order determined that petitioner Hydro Nuclear Services, Inc. ("Hydro") violated Section 210 of the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5851, when it failed to hire petitioner-intervenor Shannon T. Doyle because of his refusal to sign an authorization for release of records including a release of liability provision. The ARB's decision and order granted Doyle remedies of $218,378 in back pay, $154,695 in front pay, $45,000 in lost benefits, $80,000 in compensatory damages, $290,127.47 in attorney's fees and costs, and prejudgment and postjudgment interest on both the front and back pay.

In these proceedings Hydro contests the finding of liability while Doyle contends that the ARB should have awarded him a tax enhancement to compensate for the burden of receiving a lump sum award of back pay. For the reasons set forth below, we will grant Hydro's petition, set aside the Secretary's finding of liability, and vacate all awards of damages, remedies, fees and costs. Therefore, we will dismiss Doyle's petition as moot.

I. *BACKGROUND*

A. *Factual History*

The factual synopsis we detail below is not controverted. Hydro,[FN1] based in Moorestown, New Jersey, provided temporary workers to assist in the decontamination and maintenance of nuclear power plants. Hydro had a contract with the D.C. Cook nuclear power plant in Bridgeman, Michigan, to supply the plant with temporary and year-round

decontamination technicians.

FN1. In 1989, Hydro combined with two other subsidiaries of Westinghouse Electric Corporation under the name Westinghouse Radiological Services. Nevertheless, though technically Hydro no longer exists as a separate entity, we employ the name "Hydro" for the sake of simplicity.

In the fall of 1988, Hydro recruited Doyle to work as a temporary senior decontamination technician during a planned refueling outage at the plant. The pay rate for this job was to be modest, $6.50 per hour with an enhancement for overtime and a $48.00 per diem allowance. As part of the routine screening process, Hydro required Doyle to take a series of psychological and drug tests and to complete a routine employment application that included Hydro's standard "Authorization ***246** for Release of Information and Records." In this regard, Hydro treated Doyle the same as all other job applicants, and Doyle does not claim otherwise. The authorization stated as follows:

> AUTHORIZATION FOR RELEASE OF INFORMATION AND RECORDS
>
> In accordance with the Privacy Act (5U.S.C. 552a), I, the undersigned expressly authorize any person, association, firm, company, criminal justice agency, Credit Extending Organizations, Schools, Doctors, or Hospitals, Department or agency of a City, County, or State Government, or of the Federal Government to release and furnish to Hydro Nuclear Services and its authorized representatives _____ any and all information and records pertaining to me including, but not limited to, originals or copies of any documents, records, reports, transcripts, abstracts, military records, criminal records, or any other

information.

Further, I hereby release and discharge Hydro Nuclear Services, their representatives, and their clients for whom the investigation is being performed and any organization listed above furnishing or receiving any information pertaining to me from any and all liability or claim as results [sic] of furnishing or receiving such information pursuant to this authorization.

Hydro Nuclear Services is authorized to utilize the information it obtains for the purpose of evaluation, my eligibility for clearance, allowing unescorted access to Nuclear Power Stations, as required by Government regulations.

A photo copy of this authorization shall be deemed an original and shall be accepted as such by any person or organization.

JA at 181.

Doyle refused to sign the authorization presented, asserting to Robert Booker, Hydro's Manager of Employee Relations, that the second quoted paragraph waived his right to file a charge under the ERA. Doyle's concern largely was attributable to his belief that his former employer, Alabama Power Company, against whom he had filed a "whistleblowing" claim, implicitly was included in the release. Doyle advised Booker of this claim, thus giving Hydro its first notice of it. Doyle opted to cross out the paragraph in question and sign the redacted version of the authorization.

Booker, however, informed Doyle that unless he signed the original version of the authorization, Hydro would be unable to tender him an offer of employment. Notwithstanding the caveat, Doyle refused to sign the full authorization. Hydro, in turn, chose not to hire Doyle, though it did compensate him

for travel expenses and per diem rates as agreed.

B. *Procedural History*

On December 9, 1988, Doyle filed a *pro se* complaint with the Wage and Hour Division of the United States Department of Labor, alleging that Hydro violated the employee protection provisions of the ERA by refusing to hire him unless he signed the release. Hydro filed a response on January 26, 1989.

After an unsuccessful conciliation attempt and investigation, the Wage and Hour Division rejected the claim, concluding that Hydro did not violate the ERA by ceasing to consider Doyle for potential employment once he refused to sign the full authorization because "[a]ll evidence indicates that Hydro Nuclear Services, Inc. terminated [Doyle's] employment solely because of [his] refusal to sign the firm's standard Privacy Act waiver form and not because of [his] prior admitted whistleblower ***247** activities" or engagement in other "protected activity under the Energy Reorganization Act." JA at 186.

Notified of his right to appeal and obtain a hearing on the merits, Doyle formally requested review by an administrative law judge. Hydro and Doyle submitted a stipulated record of fact and motions for summary decision pursuant to 29 C.F.R. §§ 18.40 and 18.41.

On July 11, 1989, the administrative law judge issued his Recommended Decision and Order Granting Respondent's Motion for Summary Judgment indicating as follows:

> [Hydro] had a right to require all prospective employees to sign such a release in order to obtain all necessary information pertaining to an individual's post [sic] record. Since [Doyle] refused to accept this requirement I find that [Hydro] had a legal right to

> refuse to employ [Doyle]. Employers who hire workers for nuclear power plants must ensure the health and safety of the public by carefully screening all prospective employees. [Hydro] in requiring all employees including [Doyle] to sign its release was exercising an essential step in performing its duty of responsible investigation and screening of employees.
> JA at 10-11.

The Secretary conducted a *de novo* review of the recommendation of the administrative law judge. Finally, on March 30, 1994, the Secretary issued a letter Final Decision and Order, rejecting the analysis of the administrative law judge and concluding that Hydro "violated the ERA when it refused to hire [Doyle] because he refused to sign the authorization form unless the release of liability paragraph was deleted." JA at 22. The Secretary ordered Hydro to reinstate Doyle with back pay, including interest.

In reaching his result the Secretary indicated that "[e]ven lawyers can disagree over the scope and effect of the language in question." He indicated, however, that:

> Giving the authorization form its most narrow reading, it would release [Hydro] and any other employer from whom [Hydro] obtained information about [Doyle] from any claim that the information had been provided or used to deny [Doyle] employment because of protected activities under the ERA. In other words, by signing the form, [Doyle] would have waived his right to file a complaint of illegal blacklisting under the ERA.
> JA at 16-17 (footnote omitted).

The Secretary subsequently stated:

> There can be little doubt that, if [Doyle] had signed the authorization form, but [Hydro] refused to hire

him based on information from a previous employer about [Doyle's] protected activities, and [Doyle] filed a complaint under the ERA of discriminatory refusal to hire, waiver of rights under the ERA could not be raised by [Hydro] as a defense. Otherwise, any covered employer could nullify the Act and Congressional intent to protect public health and safety by prohibiting retaliation against those who report potential safety hazards in the construction and operation of nuclear power plants.

JA at 19.

Hydro petitioned this court for review of the Secretary's decision and order on May 26, 1994. Thereafter, on August 24, 1994, we granted a joint motion of the Secretary and Hydro to remand the matter for further administrative proceedings to determine Doyle's remedy. On September 7, 1994, the Secretary, in turn, remanded the case to an administrative law judge.

***248** After permitting additional discovery on the issue of damages, the administrative law judge conducted a hearing on December 14, 1994. The judge issued a Recommended Decision and Order on Damages on November 7, 1995, awarding Doyle back pay, front pay, compensatory damages, interest, attorney's fees, costs, and other equitable relief, including corrections to his personnel records. *See* JA at 44. With limited changes, the ARB, acting on behalf of the Secretary pursuant to 61 Fed. Reg. 19978, adopted those recommendations on September 6, 1996. *See* JA at 55-65. [FN2] Subsequently, Doyle and Hydro respectively filed petitions for review with this court and with the United States Court of Appeals for the Sixth Circuit, which thereafter were consolidated and dismissed as premature. *See* JA at 708-713.

FN2. The Board rejected the recommendations concerning front pay and encouraged the parties to reach an agreement on the average hourly rate for non-local decontamination workers in the nuclear industry during the relevant period. *See* JA at 62.

On November 26, 1997, the ARB remanded the case to an administrative law judge for further proceedings to resolve the open issues regarding the proper amount of damages to which Doyle was entitled. *See* JA at 66-71. The parties entered into a series of stipulations, following which an administrative law judge issued his Final Recommended Decision and Order on Damages on February 12, 1999, *see* JA at 100-11, and his Final Recommended Decision and Order Awarding Attorney Fees on November 15, 1999. *See* JA 114-29. On May 17, 2000, the ARB issued its Final Decision and Order in this matter. *See* JA at 130-56.

On May 18, 2000, Hydro petitioned for review of the Final Decision and Orders of March 30, 1994, and May 17, 2000, to the United States Court of Appeals for the Sixth Circuit. The following day, Doyle petitioned this court for review of the Final Decision and Order of May 17, 2000 insofar as it provided for damages. [FN3] On June 5, 2000, the Judicial Panel on Multidistrict Litigation ordered the petitions consolidated in this court. The Court of Appeals for the Sixth Circuit then transferred the Hydro petition to this court on July 6, 2000, and we consolidated the proceedings on July 14, 2000. [FN4]

FN3. Hydro petitioned the Court of Appeals for the Sixth Circuit because the events at issue here took place within that circuit. Doyle petitioned this court as Hydro's office was within this circuit.

FN4. Doyle has filed an action in the United States District Court for the Western District of Pennsylvania to enforce the monetary award of the ARB but the district court has stayed that case pending

disposition of the petitions before this court.

II. *JURISDICTION*

We have jurisdiction to review a final order of the Secretary of Labor pursuant to 42 U.S.C. § 5851(c). [FN5] The Secretary of Labor had subject matter jurisdiction over this action pursuant to 42 U.S.C. § 5851(b).

FN5. Section 5851(c) states, in pertinent part, that "[a]ny person adversely affected or aggrieved by an order issued [by the Secretary of Labor] ... may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred."

III. *DISCUSSION*

A. *Standard of Review*

A reviewing court may overturn a decision of the Secretary only if it is "arbitrary, ***249** capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); [FN6] *see Southwestern Pa. Growth Alliance v. Browner,* 121 F.3d 106, 111 (3d Cir.1997). However, while we pay deference to the Secretary in construing the statutes he is charged with administering, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and will set aside the Secretary's factual determinations only if they are unsupported by substantial evidence, 5 U.S.C. § 706(2)(E), we exercise plenary review in deciding questions of law. *See Dill v. INS,* 773 F.2d 25, 28 (3d Cir.1985); *see also Williams v. Metzler,* 132 F.3d 937, 946 (3d Cir.1997) ("we owe no deference to an erroneous conclusion of law").

FN6. 42 U.S.C. § 5851(c)(1) incorporates by reference section 706 of the Administrative Procedure Act.

B. *Hydro's Liability Under the ERA*

Section 210 [FN7] of the ERA prohibits an employer from discharging or otherwise "discriminat[ing] against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee" engaged in any of the activities protected under the Act, including reporting an alleged nuclear safety violation or refusing to engage in any practice made unlawful by the ERA. 42 U.S.C. § 5851(a). [FN8]

FN7. When Doyle brought his complaint, the whistleblower protections at issue were included in section 210 of the ERA. In 1992, Congress redesignated the relevant section as 211. *See Timmons v. Mattingly Testing Servs.*, No. 95-ERA-40, 1996 DOL Ad. Rev. Bd. LEXIS 30, at *1 n. 2 (June 21, 1996).

FN8. In 1992, Congress extended ERA protection to employees lodging internal complaints. Previously, a number of courts had distinguished between whistleblowers who provide information to government entities from those who complain merely to the employer. *Compare Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1034 (5th Cir.1984) (absence of express language covering employees filing internal complaints suggests that Congress intended to deny protection), *with Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512-13 (10th Cir.1985) (rejecting a "narrow, hyper-technical reading of § 5851 ... to effect the statute's aim of protection" by extending coverage to cases involving the filing of internal complaints). The Act as amended now protects an employee who "notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954," 42 U.S.C. § 5851(a)(1)(A), and an employee who "refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer," 42 U.S.C. § 5851(a)(1)(B).

The Energy Policy Act of 1992, Pub.L. No. 102-486, 106 Stat. 2776, effective October 24, 1992, amended section 210 to incorporate a burden- shifting paradigm whereby the burden of persuasion falls first upon the complainant to demonstrate that retaliation for his protected activity was a "contributing factor" in the unfavorable personnel decision. [FN9] However, these ***250** amendments do not apply here because Doyle filed his claim well before October 24, 1992. *See* Pub.L. No. 102-486, 106 Stat. 2776, 3125.

FN9. The amendment, aptly titled "Avoidance of Frivolous Complaints," also adopted a host of additional gatekeeping functions (for example, the Secretary cannot even initiate an investigation until the complainant establishes a prima facie case). *See* Pub.L. 102-486, 106 Stat. 2776, 3123(d). 42 U.S.C. § 5851(b)(3) now provides:

> (A) The Secretary shall dismiss a complaint filed under paragraph (1), and shall not conduct the investigation required under paragraph (2), unless the complainant has made a prima facie showing that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint. (B) Notwithstanding a finding by the Secretary that the complainant has made the showing required by subparagraph (A), no investigation required under paragraph (2) shall be conducted if the employer demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior.
>
> (C) The Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.
>
> (D) Relief may not be ordered under paragraph (2) if the employer demonstrates by clear and convincing evidence

> that it would have taken the same unfavorable personnel action in the absence of such behavior.

We find no guidance in the governing provisions of the ERA in force before the 1992 amendments allocating the procedural burdens in a section 210 whistleblower discrimination claim. However, prior to 1992, the Secretary consistently utilized the burden shifting taxonomy for ERA retaliation actions set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See, e.g., Dysert v. Westinghouse Elec. Corp.,* No. 86-ERA-39, 1991 DOL S. Labor LEXIS 72 at *4-5 (Oct. 30, 1991); *Riden v. Tennessee Valley Auth.,* No. 89-ERA-49, 1990 DOL S. Labor LEXIS 80 at * 10-12 (Feb. 9, 1990); *Long v. Roadway Express, Inc.,* No. 88-STA-31, 1989 DOL S. Labor LEXIS 53 at *10 (Sept. 15, 1989).

Moreover, even though the Supreme Court never ruled on the point, a number of other courts of appeals followed course by applying the burdens of proof and production originally created to address actions arising under the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, to whistleblower retaliation claims brought under the ERA prior to the 1992 amendments. *See, e.g., Kahn v. United States Sec'y of Labor,* 64 F.3d 271, 277-78 (7th Cir.1995); *Bechtel Constr. Co. v. United States Sec'y of Labor,* 50 F.3d 926, 933-34 (11th Cir.1995); *Couty v. Dole,* 886 F.2d 147, 148 (8th Cir.1989); *Consolidated Edison Co. of New York, Inc. v. Donovan,* 673 F.2d 61, 62 (2d Cir.1982); *cf. Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor,* 992 F.2d 474, 480-81 (3d Cir.1993) (adapting McDonnell Douglas prima facie standard to retaliatory discharge claim under the Clean Water Act, 33 U.S.C. § 1367(a)); *Moon v. Transport Drivers, Inc.,* 836 F.2d 226, 229 (6th Cir.1987) (same, under the Surface Transportation Assistance Act, 49 U.S.C. § 2305(a)).

We find no reason to deviate from the procedure followed by the Secretary and the other courts of appeals and thus we will not distinguish ERA actions from claims arising under analogous anti-retaliation statutes. Accordingly, we adopt the *McDonnell Douglas* burden shifting guidelines in our analysis of this case. [FN10] Under this burden shifting regime the employee in the first instance must establish a prima facie case. If he does then the burden shifts to the employer to articulate a legitimate non-retaliatory reason for the adverse action. If the employer does so the employee is required to prove that the employer's proffered reason for its action is a mere pretext for unlawful retaliatory conduct. *See Kahn,* 64 F.3d at 277-78. For Doyle to establish a prima facie case he must demonstrate: (1) his engagement in protected activity; (2) Hydro's awareness of his engagement in protected activity; (3) an adverse employment action; and (4) a sufficient inference of retaliatory motive. *See* ***251** *Macktal v. United States Dep't of Labor,* 171 F.3d 323, 327 (5th Cir.1999). [FN11]

FN10. We note further that the parties do not dispute the applicability of the standard.

FN11. Regardless, even were we to reject the applicability of *McDonnell Douglas* to an action for retaliation under the ERA, the statute compels that we reach the pivotal issue of whether Hydro discriminated against Doyle because he availed himself of ERA-protected rights. *See Blum v. Witco Chem. Corp.,* 829 F.2d 367, 372 n. 2 (3d Cir.1987) ("Once a case has been fully litigated, however, it is unnecessary for the appellate court to decide whether a prima facie case had, in fact, been established.") (internal punctuation omitted).

Thus, in spite of its considerable procedural twists and turns, [FN12] we are satisfied that this case boils down quite simply to the following issue: Did Doyle, in the first instance,

make out a prima facie case of unlawful retaliation on the part of Hydro? We answer this question in the negative. [FN13]

FN12. While we understand that the scope of any litigation may far exceed its reasonably contemplated time and costs, it is simply inexplicable that this fairly straightforward case has toiled in the federal administrative and judicial dockets for more than 13 years. Even taking into account the changes in governmental administration, we especially are confounded by the fact that the record reflects no activity in the case from July 11, 1989, until March 30, 1994, when the Secretary made his initial Final Decision and Order. In this regard we point out that this decision and order consisted of a nine-page double spaced letter of no great complexity.

FN13. Hydro does not contend that the Secretary erred in regarding Doyle as covered by section 210 even though he was merely an applicant for employment.

First, we conclude that Doyle did not engage in protected activity when he refused to sign the employment application with the release. The Secretary, disagreeing with the Wage and Hour Division of the Department of Labor and the administrative law judge, determined that by signing the release Doyle "would have waived his right to file a complaint of illegal blacklisting under the ERA." Consequently, he concluded that the waiver-as so construed-violated the ERA because it created for employees an impermissible Hobson's Choice between employment and the reporting of safety hazards. As such, Doyle's refusal to sign constituted protected activity as the release could not be used lawfully to waive his right.

Yet the release said nothing about waiving liability for illegal blacklisting. It merely released the enumerated organizations from liability as a "result[ ] of furnishing or receiving such information pursuant to this authorization."

This limited purpose was consistent with the authorization's provision waiving rights to privacy in its first paragraph. Furthermore, the third paragraph of the authorization confirms the limited purpose of the release by authorizing Hydro to use the information for the enumerated purposes ("evaluation" and "eligibility for clearance") without suggesting that an employment applicant released Hydro from liability under the ERA if it made an unlawful employment determination. The release simply did not purport to waive liability for Hydro's employment decisions or other claims Doyle might make under the ERA after Hydro received information pursuant to the authorization. It merely released potential claims for privacy infringement.

Moreover, even if the release, as the Secretary thought, could be construed to include a waiver of Doyle's right to file a complaint for illegal blacklisting, the Secretary should not have so construed it in light of a well- recognized principle of law requiring that ambiguous documents should not be deemed illegal where capable of constructions that will validate them. *See Walsh v. Schlecht,* 429 U.S. 401, 407-08, 97 S.Ct. 679, 685, 50 L.Ed.2d 641 (1977). After all, the Secretary himself ***252** made the point that such a waiver would be unenforceable. Thus, the Secretary should not have construed the authorization to include an illegal release.

In sum, the Secretary went through the following process. He took a release that he regarded as ambiguous and construed it to apply to situations that by its terms it did not include. He then held that the release was unlawful and found liability by reason of Hydro's action in refusing to hire Doyle because he would not sign the authorization with the release. But we will not similarly construe the release to have the expansive effect the Secretary attributes to it and, accordingly, we hold that Doyle simply was not engaging in a protected activity when he

refused to sign the authorization with the release. [FN14] Thus, Hydro must prevail in these proceedings.

FN14. We see no reason to defer to the Secretary on this issue of law involving the construction of a proposed contract rather than construction of a statute. *See Williams v. Metzler,* 132 F.3d at 946. In reaching our result we are treating this case as involving contractual construction rather than interpretation as the parties' stipulation of facts did not address the meaning of the release and the parties did not address its meaning with other evidence. Thus, this is not a case in which the Secretary reached a conclusion after a plenary hearing addressing the parties' intent when Hydro tendered the authorization. Moreover, we do not find the release to be ambiguous. *See Beck v. Reliance Steel Prods.,* 860 F.2d 576, 581 (3d Cir.1988). We also note that the Secretary must have thought that he was construing the release as he made it clear that he was dealing with its "scope and effect." Regardless, even if we treated the case as involving contractual interpretation rather than construction our result would be the same as the evidence, *i.e.,* largely the authorization itself, could not support the Secretary's result.

There is a second, independent reason why we are constrained to grant Hydro's petition and set aside the decision and order of the ARB. Accepting *arguendo* that Doyle established a prima facie case, he has not offered substantial evidence to support a conclusion that Hydro's proffered legitimate reasons for refusing to hire him without his signing the authorization with the release-namely, to ensure power plant integrity and compliance with the governing regulatory framework [FN15] by hiring only carefully screened temporary employees-were pretextual, as required to impose liability. This point is critical for the Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 143, 120 S.Ct. 2097, 2106, 147 L.Ed.2d 105 (2000), indicated that once the employer provides a legitimate, non-discriminatory reason for the personnel decision, the burden shifts to the complainant

to show by a preponderance of the evidence that the employer's benign explanation was contrived in order to obscure the genuine discriminatory motive percolating beneath.

> FN15. *See, e.g.,* 53 Fed.Reg. 7534 (The Nuclear Regulatory Commission proposing background investigation, psychological evaluation, and behavioral observation of individuals who require unescorted access to vital areas of nuclear facilities); *see also* 10 C.F.R. § 73.56 (1991) (unescorted access authorization:
>
> > must include ... [a] background investigation designed to identify past actions which are indicative of an individual's future reliability within a protected or vital area of a nuclear power reactor. As a minimum, the background investigation must verify an individual's true identity, and develop information concerning an individual's employment history, education history, credit history, criminal history, military service, and verify an individual's character and reputation).

Here, Doyle simply did not meet that burden. [FN16] Indeed, the record makes ***253** clear that Hydro furnished the authorization to all applicants for temporary positions. More significantly, the record does not illustrate that Hydro previously made exceptions in its hiring practices for applicants, if there were any, similarly situated to Doyle who insisted on signing a modified version of the authorization or on not signing the authorization at all. [FN17] *See EEOC v. Metal Serv. Co.,* 892 F.2d 341, 347 (3d Cir.1990) (a disparate treatment violation is made out only when an individual is shown to have been singled out and treated less favorably than others similarly situated on the basis of an impermissible criterion). Without any circumstantial evidence to suggest that Hydro treated him less favorably because of his exercise of rights purportedly protected under the ERA, Doyle's inventive characterization of the parties' stipulation of facts standing alone is unavailing. [FN18]

FN16. In fact, the Secretary never addressed in his Final Decision and Order the issue of Hydro's discriminatory intent and instead expressly limited the inquiry simply to a determination of whether the activities in which Doyle participated and for which Doyle was not hired were protected statutorily. *See* JA at 21 n. 5 ("The issue here, however, is not whether use of the form was a pretext for discrimination or some other impermissible reason. Respondent's reason for not hiring Complainant is clear. The *only* issue is whether that reason is itself a violation of the ERA.") (emphasis added). However, retaliation as a matter of law (and logic) does not occur unwittingly and, therefore, a finding of liability requires "an inquiry into the defendant's state of mind" to prove that "the defendant subjectively intended to discriminate against the plaintiff" on account of his engagement in a protected activity. *EEOC v. Chicago Miniature Lamp Works,* 947 F.2d 292, 297 (7th Cir.1991) (citing *Intl. Bhd. of Teamsters v. United States,* 431 U.S. 324, 336 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977)).

FN17. Likewise, the record does not explicate that Hydro accommodated applicants comparable in all respects to Doyle save for previous whistleblowing activity. Of course, the gravamen of Doyle's complaint was not that Hydro retaliated because he disclosed prior whistleblowing activities, but because he refused to sign the authorization as written. *See* JA at 179-80 (advancing, in his initial complaint to the Department of Labor, arguments concerning only the legitimacy of the waiver); *see also* JA at 202-204 (same, in his Prehearing Statement of Position); JA at 206- 07 (same, in his Motion for Summary Decision).

FN18. Doyle purports to extrapolate from the stipulated facts, JA at 194-96, that Booker (and by extension, Hydro) must have intended to force him to waive his rights under section 210 as a condition of employment because Booker refused to alter the form even though Doyle was perfectly willing to permit complete access to his previous employment records. However, as Hydro correctly notes, Doyle's induction depends on an assumption not borne out by the record that Booker understood that the standard version of the form functioned to release Hydro from future claims under the ERA.

Doyle suggests that Hydro's discriminatory intent nevertheless may be inferred from the authorization itself. We are not persuaded because the document is facially neutral, singling out neither the ERA and any rights protected thereunder, nor Doyle individually. Likewise, the authorization does not differentiate between employers in high-risk industries like nuclear power that trigger our greatest concerns about blacklisting and employers in otherwise innocuous, generic industries from whom information also could be sought in the application process. Moreover, as we previously have discussed, the terms of the authorization with the release served only to facilitate-without incurring liability-Hydro's assimilation of necessary and highly sensitive employee background information and not to insulate Hydro from potential ERA claims or to chill manque nuclear whistleblowers. *See DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 727 (3d Cir.1995) ("The touchstone of explicit facial discrimination is that the discrimination is apparent from the terms of the policy itself"). [FN19]

FN19. *Compare Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 192, 197, 111 S.Ct. 1196, 1200, 1202, 113 L.Ed.2d 158 (1991) (policy that "women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights" was facially discriminatory because it "excludes women with childbearing capacity from lead-exposed jobs and so creates a facial classification based on gender"); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) (employer's policy requiring female employees to make larger contribution to pension fund than male employees is discriminatory on its face); *Connecticut Light & Power Co. v. Sec'y of United States Dep't of Labor*, 85 F.3d 89, 95-96 (2d Cir.1996) (proposed settlement agreement violated the ERA because it contained explicit gag provisions aimed at having the employee relinquish his statutory rights); *EEOC v. Board of*

Governors of State Colls. & Univs., 957 F.2d 424, 431 (7th Cir.1992) (holding that a collective bargaining agreement violated the anti-retaliation provision of the Age Discrimination in Employment Act because, on its face, it unambiguously denied an employee his contractual right to file an in-house grievance once he elected to file an age discrimination charge).

***254** It is undeniable that Hydro initially required Doyle to sign the authorization before it was aware of his prior claim against Alabama Power and that in doing so it treated him the same as other applicants for employment. Furthermore, in view of the highly regulated nature and risks in the nuclear power industry we cannot hold that Hydro did not have a legitimate reason for requiring him to sign the release. Indeed, despite Doyle's protestations to the contrary, the other forms he signed in connection with the employment application are not comparable to the authorization because they concerned only an applicant's possible prior criminal record, not his full employment history. *See* JA at 261, 269. Thus, Doyle's case must fail. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981) ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.").

IV. *CONCLUSION*

For the foregoing reasons, we will grant the petition for review filed by Hydro in No. 00-2035, and set aside the March 30, 1994 Final Decision and Order of the Secretary of Labor as to liability and the May 17, 2000 Final Decision and Order of the ARB as to damages and remedies. We will dismiss the petition for review filed by Doyle in No. 00-1589 as moot because we are setting aside the finding of liability outright

without further proceedings. This opinion is intended to bring this case to a conclusion.

BRIGHT, Circuit Judge, dissenting.

I respectfully dissent from the majority's opinion. This case is not about contract law. It is about statutory interpretation and, as the Secretary of Labor recognized, Congress' goal of protecting our nation from a nuclear accident through the promotion of safety in the nuclear power industry. Quite simply, workers who report safety violations should be protected and not suffer retaliation for their good deeds.

In the instant case, the Secretary looked to the text and underlying purposes of the employee protection provisions of the ERA and construed the statute to protect Shannon T. Doyle's ERA whistleblower rights. Because of the compelling public interest in keeping channels of information open, the Secretary decided that employees must not be compelled to sign what they believe to be a waiver of past and future ERA claims as a condition of employment.

***255** On its face, Hydro's waiver can be read to release former employers as well as putative employers from liability. [FN1] This is how Mr. Doyle, a lay person unrepresented by counsel, read the release during his pre-employment screening, and it is likely how a lay person in the same situation would understand the release language. [FN2] The legal insufficiency of the waiver is immaterial because an ordinary reader would not know that the waiver could not be used by the employer as a defense to a retaliation claim.

FN1. The waiver of liability includes sweeping terms, such as "furnishing or receiving *any* information pertaining to me from *any*

and all liability or claim ..." (emphasis added).

FN2. I quote from the Secretary's decision:

> I note that Complainant is a layman who was not represented by counsel when the dispute over the authorization form took place. Even lawyers can disagree over the scope and effect of the language in question. It is not surprising that Complainant refused to sign a form which could easily be interpreted as a waiver of his rights under the ERA.
> JA at 16, n. 1.

I would reject this release not just as a violation of Mr. Doyle's ERA rights, but as a violation of all employees' rights. Anyone signing this release could be left with the impression that they have waived their right to bring a retaliation suit against Hydro or any past employer. This impression would chill the employee's inclination to report safety issues to the proper regulatory authorities. Under this scenario, Congress' goal of making the nuclear industry safer by protecting potential whistleblowers is fundamentally undermined. *See Passaic Valley Sewerage v. United States Dept. of Labor,* 992 F.2d 474, 478 (3d Cir.1993) ("Such 'whistle-blower' provisions are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment....").

A broad interpretation of the scope of ERA protection comports with the ERA's remedial purpose and the legislative history indicating that a narrow interpretation of the employee protection provisions would frustrate the intent of Congress. *See Connecticut Light & Power Co. v. Secretary of Labor,* 85 F.3d 89, 94 (2d Cir.1996) (upholding Secretary's broad interpretation of the term "employee" to cover an employee recently terminated). *See also Bechtel Constr. Co. v. Secretary of Labor,* 50 F.3d 926, 932 (11th Cir.1995) ("[I]t is appropriate to give a broad construction to remedial statutes such as

nondiscrimination provisions in federal labor laws."); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir.1985) (affirming the Secretary's broad interpretation of protected activity).

Additionally, Hydro's refusal to alter the release upon learning of Mr. Doyle's concerns supports the inference that Hydro used Doyle's refusal to sign as a convenient way to avoid hiring an individual who is zealous about nuclear safety. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.").

Finally, Hydro did not need the waiver of liability to get the information it required about Mr. Doyle. The screening procedures of the American National Standard on Security for Nuclear Power Plants (ANSI) indicate that all the background information necessary to meet the ANSI standard can be obtained through a simple ***256** release; there is nothing in the standard or screening requirements that requires a waiver of liability. The Secretary makes this point forcefully: "Respondent has not offered any reason why the background information it needs to conduct the screening under the ANSI standard cannot be obtained with a release which does not include a waiver of liability." JA at 21.

I would sustain the Secretary's decision. In this case, we have done a grave injustice to Mr. Doyle, a man who was blacklisted from his chosen line of work for attempting to preserve his rights under a federal statute. [FN3] We have upheld an employer's ability to make its employees uncertain about the status of their nuclear whistleblower rights. We have thereby dealt a blow to the safety of the nuclear industry.

FN3. Despite diligently seeking employment outside the nuclear industry, Mr. Doyle was only able to obtain three non-nuclear related jobs between November 1988 and December 1994 (the date of the hearing on damages) from which he earned a total of about $3000. Hydro's publication of its decision to deny Mr. Doyle access at a nuclear power plant had a devastating psychological, emotional, and financial impact on Mr. Doyle and his family.

285 F.3d 243, 18 IER Cases 838

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 00-1589 & 00-2035

SHANNON T. DOYLE,
Petitioner at No. 00-1589

v.

U.S. SECRETARY OF LABOR and
U.S. DEPARTMENT OF LABOR ADMINISTRATIVE
REVIEW BOARD,

Respondents

HYDRO NUCLEAR SERVICES, INC.,
Petitioner at No. 00-2035

v.

THE SECRETARY OF LABOR,
ADMINISTRATIVE REVIEW BOARD,
and THE UNITED STATES DEPARTMENT OF LABOR,

Respondents

(Cases No. 89-ERA-22 (ALJ),
Nos. 99-041, 99-042, 00-012 (ARB))

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge,
SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH,
McKEE, BARRY,
AMRO, FUENTES, GREENBERG*, and BRIGHT**,
Circuit Judges

The petition for rehearing filed by petitioner/intervenor, Shannon T. Doyle, in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

* As to the panel rehearing only.
** The Honorable Myron H. Bright, United States Circuit Judge for the Eighth Judicial Circuit, who sat by designation, as to panel rehearing only.

BY THE COURT,

_____

Circuit Judge

Dated: May 30, 2002

Doyle v. Hydro Nuclear Servs., **89-ERA-22** (Sec'y Mar. 30, 1994) (served on Apr. 1, 1994)

DATE: March 30, 1994
CASE NO. **89-ERA-22**

IN THE MATTER OF

SHANNON T. DOYLE
COMPLAINANT,

v.

HYDRO NUCLEAR SERVICES,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

The Administrative Law Judge (ALJ) submitted a Recommended Decision and Order (R.D. and O.) in this case arising under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988), recommending that the complaint be dismissed. He held that Respondent refused to hire Complainant for a legitimate reason, not for protected activities under the ERA.

Complainant applied for a position with Respondent in October 1988 and went through various employment screening

procedures in November 1988. Among other things, Respondent required Complainant to complete an Authorization for Release of Information and Records (authorization form), authorizing Complainant's prior employers and other organizations to release his employment and other records to Respondent. The authorization form included the following paragraph which Complainant crossed out before signing the form:

> Further, I hereby release and discharge Hydro Nuclear Services, their representatives, and their clients for whom the investigation is being performed and any
>
> [PAGE 2]
> organization listed above furnishing or receiving any information pertaining to me from any and all liability or claim as results [sic] of furnishing or receiving such information pursuant to this authorization.

Complainant objected to this paragraph of the authorization form because he believed it constituted a waiver of his rights under the ERA. Complainant told Robert Booker, Respondent's Manager of Employee Relations, about Complainant's "previous whistleblower status and the difficulties [he] had experienced in obtaining further nuclear industry [sic] employment." December 9, 1988 complaint to Wage-Hour Division, page 6. Complainant refused to sign another copy of the authorization form unless it was amended and Respondent refused to hire him.

The ALJ held that Complainant misconstrued the authorization form because he "incorrectly believes that [the] release would jeopardize any 'whistleblower' remedies he may be pursuing against other entities." R.D. and O. at 4. The ALJ concluded that "Respondent had a right to require all

prospective employees to sign such a release in order to obtain all necessary information pertaining to an individual's post [sic] record. Since Complainant refused to accept this requirement . . . Respondent had a legal right to refuse to employ Complainant." I disagree with the ALJ's interpretation of the authorization form, and the applicability of the ERA to this situation.

The ERA provides that:

> No employer . . . may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under [the ERA] . . . (2) testified or is about to testify in any such proceeding or; (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of [the ERA].

The authorization form releases Respondent and "any organization . . . furnishing . . . information [about Complainant] from *any and all liability* . . . as [a] result[] of furnishing or receiving such information . . . ." (Emphasis added.) Giving the authorization form its most narrow reading, [1]

[PAGE 3]

it would release Respondent and any other employer from whom Respondent obtained information about Complainant from any claim that the information had been provided or used to deny Complainant employment because of protected activities under the ERA. In other words, by signing the form,

Complainant would have waived his right to file a complaint of illegal blacklisting under the ERA. [2]

No case have been found, and the parties have not cited any, directly on point. Cases from other areas dealing with analogous situations indicate, however, that waivers such as this are highly disfavored. An analogous situation arose under the Fair Labor Standards Act, 29 U.S.C. §§ 201-217 (1988). In *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945), an employee accepted a check from his employer for overtime pay which the employer had failed to pay him two years before, and signed a release of all his rights under the FLSA. The employee later sued for liquidated damages under § 216(b). 29 U.S.C. § 216(b). The Court held that such a written waiver, in the absence of a bona fide dispute between the parties as to liability, does not bar a claim for liquidated damages. The Court said "[w]here a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate." 324 U.S. at 697. Whether the statutory right may be waived under any particular statute depends on the intent of Congress. Id. The Court looked to the legislative policy behind the liquidated damages provision because the FLSA and the legislative history were silent on this point. Id. at 706. The Court found the purpose of the FLSA was "to protect certain groups . . . from sub-standard wages and excessive hours which endangered the national health and well being and the free flow of goods in interstate commerce." Id. Waiver of statutory minimum wages and overtime pay would nullify the act, and the Court found that waiver of liquidated damages would have the same effect. Id. at 707.

Even where individuals considered themselves "volunteers" who would not accept compensation from the

business enterprises of a religious foundation, the Court has held that they are nevertheless employees if they meet the "economic realities" test. Otherwise, employers could coerce employees through superior bargaining power to testify that they are volunteers, or to waive their rights under the FLSA. *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 302 (1985).

Waiver of a right to sue on an existing claim under Title [PAGE 4] VII of the Civil Rights Act of 1964 or the Age Discrimination in Employment Act is enforceable, if there is proof that the waiver and the circumstances under which it was signed meet certain standards. *See. e.a., Torrez v. Public Serv. Co.*, 908 F.2d 687, 689 (10th C ir. 1990). [3] However, "[t]here can be no prospective waiver of an employee's rights under Title VII." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974).

There can be little doubt that, if Complainant had signed the authorization form, but Respondent refused to hire him based on information from a previous employer about Complainant's protected activities, and Complainant filed a complaint under the ERA of discriminatory refusal to hire, waiver of rights under the ERA could not be raised by Respondent as a defense. Otherwise, any covered employer could nullify the Act and Congressional intent to protect public health and safety by prohibiting retaliation against those who report potential safety hazards in the construction and operation of nuclear power plants. *Mackowiak v. University Nuclear Sys. Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984) (the ERA has "the broad remedial purpose of protecting workers from retaliation based on their concerns for safety and quality"); *Hill v. TVA*, Case Nos. 87-ERA-23, 24, Sec. Decision May 24, 1989, slip op. at 4-5 ([i]n the nuclear power industry, given the magnitude of the potential hazards to

employee and public safety and health, there is an especially compelling need to keep open the channels of communication regarding potential safety and quality violations. "If employees are coerced and intimidated into remaining silent when they should speak out, the results can be catastrophic." *Rose v. Secretary of Labor*, 800 F.2d 563, 565 (6th Cir. 1986) (Edwards, J., concurring)).

Requiring Complainant to choose between a job and his rights under the ERA would be equally as destructive of Congressional intent as the waiver in *Brooklyn Bank v. O'Neil.* Employers could refuse to hire those who will not waive their rights and hire only those who are willing to waive their right to complain of retaliation. Such employees may reasonably believe they have no protection under the ERA and will be afraid to speak out about safety problems. [4]

Respondent argues that it was following the American National Standard on Security for Nuclear Power Plants, ANSI/ANS - 3.3 - 1982, which provides for a comprehensive screening program for employees who are granted unescorted access to a nuclear power plant. One part of the screening program is a background review, which requires the individual to sign a release authorizing Respondent to obtain information from previous employers, educational records information, and a criminal records check. This information is necessary, Respondent states, [PAGE 5] "to satisfy the plant operator that the individual is not a threat to the plant or the public health and safety." Respondent's Brief in Support of Recommended Decision and Order at 15.

Respondent has not offered any reason why the background information it needs to conduct the screening under the ANSI standard cannot be obtained with a release which does not include a waiver of liability. Respondent asserts that "[t]he employer should be able to protect itself

against any claim arising out of the innocent, but necessary, provision or receipt of information." Id. But Respondent has not explained why, under the ERA and regulations, it should be able to shield itself from the anti-retaliation provision of the Act. [5] If Respondent "innocently", i.e., in good faith, refuses to hire an applicant based on derogatory information supplied by another employer, the other employer may be held liable for blacklisting, but not Respondent. However, if Respondent refused to hire an applicant because he filed a complaint with the NRC against another employer, such a clear violation of the ERA and the regulations would be immunized if this release were allowed to stand. Moreover, the release would also immunize other employers who might, because of a retaliatory motive, provide Respondent false or misleading information about Complainant. I find that Respondent violated the ERA when it refused to hire Complainant because he refused to sign the authorization form unless the release of liability paragraph was deleted.

Accordingly, it is ORDERED that Respondent extend an offer of employment to Complainant as a senior technician or similar comparable position, and pay Complainant back pay, with interest, less interim earnings from November 21, 1988 to the date of hire or the date of the offer of employment if Complainant declines the offer.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor
Washington, D.C.

[ENDNOTES]

[1] I note that Complainant is a layman who was not represented by counsel when the dispute over the authorization form took place. Even lawyers can disagree over the scope and effect of the language in question. It is not surprising that Complainant refused to sign a form which could easily be interpreted as a waiver of his rights under the ERA.

[2] The regulations implementing the ERA explicitly prohibit blacklisting, 29 C.F.R. 24.2(b) (1990), and the Secretary has held that blacklisting, which is "insidious and invidious [and] cannot easily be discerned," is prohibited by the ERA. *Eqenrieder v. Metropolitan Edison Co./G.P.U.*, Case No. 85-ERA-23, Sec. Decision April 20, 1987, slip op. at 8. "Blacklisting" is marking an individual "for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate." BLACK'S LAW DICTIONARY 154 (5th Ed. 1979).

[3] Even in situations where waivers are permissible, a number of factors are considered and weighed together to determine whether the waiver is enforceable. *See Torrez v. Public Service Co.*, 908 F.2d at 689. I have considerable doubt whether the waiver here would have been enforceable when evaluated by some of these standards, e.g., whether Complainant was encouraged to seek, or in fact received benefit of counsel; whether there was an opportunity for negotiation of the terms of the agreement; whether the consideration given in exchange for the waiver exceeded the benefits to which the employee was already entitled by contract or law.

[4] Some courts have held that an agreement not to sue as a condition of employment is unenforceable as against public policy. *Nicholson v. Conrail*, No. 86-C-5551 (N.D. Ill. Jan. 14, 1987) (LEXIS, Genfed library, Dist. file 244, page 2), and cases cited therein. "[A] release covering all claims that might later arise between the parties 'would constitute a consent to the foregoing of legal protection for the future and would plainly be against public policy.'" *Id.*

[5] Respondent also argues that use of the authorization form in Complainant's case was not a pretext because Respondent routinely uses the form for screening all applicants. The issue here, however, is not whether use of the form was a pretext for discrimination for some other

impermissible reason. Respondent's reason for not hiring Complainant is clear. The only issue is whether that reason is itself a violation of the ERA.

Doyle v. Hydro Nuclear Servs.,
89-ERA-22 (ALJ July 17, 1989)

U.S. Department of Labor
Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005

Dated: Jul 17 1989

Case No. **89-ERA-22**

In the Matter of:

SHANNON T. DOYLE,
Complainant

against

HYDRO NUCLEAR SERVICES,
Respondent

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

This matter arises under the Energy Reorganization Act of 1974 as amended U.S.C. § 5851 (1982) and its implementing regulations, 29 C.F.R. Part 24 (hereinafter referred to as the Act). The Act prohibits any person from discharging or otherwise discriminating against an employee, who has engaged in activity protected by the Act.

STATEMENT OF THE CASE

Shannon T. Doyle, the Complainant in this matter, filed a complaint with the Wage and Hour Division, United States

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Department of Labor, alleging that he was discharged by Respondent Hydro Nuclear Services, Inc. because he was engaged in activity protected by the Act.

The District Director for Employment Standards Administration, Wage and Hour Division on February 23, 1989 issued its notification of findings letter, finding:

> All evidence indicates that Hydro Nuclear Services, Inc. terminated your employment solely because of your refusal to sign the firm's standard Privacy Act waiver form and not because of your prior admitted whistleblower activities. Termination of employment for the above stated reason *is not a protected activity* under the Energy Reorganization Act.

February 27, 1989, Complainant timely filed a telegraphic request for formal hearing.

A Notice for formal hearing was set for April 25, 1989 and upon Respondent's motion said matter was continued and reset for June 7, 1989. On May 16, 1989 Complainant filed Motion for Summary Judgment. On May 25, 1989, Respondent filed Countermotion for Summary Judgement. Pursuant to telephonic conference call of June 5, 1989, both parties were granted additional time to file supplemental memorandum in support of said summary judgment motions and the hearing set for June 7, 1989 was continued by the Court. Complainant's memorandum was filed and Respondent's response was also filed and both have been reviewed by me in rendering this decision.

ISSUE

HAS THE PLAINTIFF ENGAGED IN ANY ACTIVITIES WHICH ARE CONSIDERED "PROTECTED ACTIVITIES" UNDER THE ACT.

STIPULATION OF FACTS

In the Respondent's Pre-Hearing Statement the following stipulation of facts by the parties was set forth:

1. After telephone conversations with another Westinghouse staffing personnel, Shannon T. Doyle spoke to Rick McCormick, Field Personnel Coordinator, at the end of October, 1988, about working for HNS at D.C. Cook in Bridgeman, Michigan. Mr. McCormick told Mr. Doyle he would be paid .20 per mile for the drive from Mr. Doyle's home in Alabama to D.C. Cook, and, for his work at the plant, $48.00 per diem, and $6.50 per hour.

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Mr. McCormick told Mr. Doyle that he would be working 72 hours per week at D.C. Cook.

2. On November 7, 1988, at the D.C. Cook location, Mr. Doyle met Dan Haynes, HNS Plant Coordinator, who paid Mr. Doyle $182.60 for his travel mileage to Michigan. Mr. Haynes also paid him $48 for his per them for November 6, 1988, his travel date, and $336 as per them for the week of November 7th through 13th. Mr. Haynes instructed Mr. Doyle to attend training sessions at D.C. Cook on November 8th. Mr. Doyle attended those sessions.

3. On November 9th, Mr. Doyle took the Minnesota Multiphasic Personality Inventory test, a psychological test. At approximately 11:30 a.m., Mr. Doyle reported to the Cedarwood Medical Center for drug screening.

4. On a date which is in dispute, Mr. Haynes informed Mr. Doyle that the preliminary results of the drug test were positive. Mr. Haynes did not identify to Mr. Doyle the substance for which he tested positive. Mr. Haynes gave Mr. Doyle the telephone number for Rick McCormick.

5. On November 14, Mr. Haynes gave Mr. Doyle his per diem payment for the week of November 14th through 20th.

6. Mr. Doyle contacted Mr. Haynes on November 17th, at which time Mr. Haynes told him he had heard nothing further about the drug test.

7. Mr. Haynes contacted Mr. Doyle on November 18th to tell him the final drug screening test results were negative. Mr. Haynes then asked Mr. Doyle to complete an employment application. Mr. Doyle went to the plant that day to up the application. Mr. Doyle was to complete the application over the weekend.

8. In the early morning of Monday, November 21st, Mr. Doyle took the completed application to D.C. Cook. Mr. Haynes told Mr. Doyle to return at 11:30 a.m. to receive his per diem payment.

9. The employment application included an Authorization for Release of Information and Records form (a copy of which is attached hereto and marked ALJ Exhibit #1). Mr. Doyle had crossed out the second paragraph of the form and then signed it.

10. Later that day, Mr. Doyle spoke with Robert Booker to express his reluctance to sign the authorization form. Mr. Doyle stated that he would sign it provided the second paragraph was deleted or amended to retain his rights under the Energy

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Reorganization Act. Mr. Booker told Mr. Doyle that, unless he

signed the release form in its entirety, HNS would cease any further consideration of employing him. When speaking to Mr. Booker, Mr. Doyle mentioned a previous whistleblower incident in which he was involved.

11. Mr. Doyle told Mr. Booker that he planned to return to his home in Alabama. He also asked that Mr. Booker make certain that he receive all of the money owed him. Mr. Doyle was not paid at that time for his trip home.

12. After Mr. Doyle left Michigan, Dan Haynes sent him a money order in an amount equal to the payment for his mileage to Michigan, that is, $182.60. He also sent Mr. Doyle a second money order in the amount of $48 as his final per diem payment.

For purposes of ruling on the motions for summary judgment, the respondent has agreed to allow me to assume that Complainant was an employee of Hydro Nuclear Services.

DISCUSSION

Complainant in his Motion for Summary Judgment argues that Complainant's refusal to sign the unaltered release form was an attempt by him to protect and preserve Complainant's rights and therefore was a protected activity under the Act. He further argues that a mandatory requirement that all personnel sign such a release is discriminatory in nature since "a person who may consider an action would give up his right to initiate that action." In Complainant's supplemental memorandum of June 7, 1989, he contends that Respondent had three separate and different authorizations all of which satisfy the requirements of the Privacy Act and the applicable standards of the American National Standard on Security for Nuclear Power Plants (ANSI/AN-33). Complainant contends that there is no requirement that an individual "release anyone from any and all liability as results of furnishing or receiving (any)

information." He further argues that Respondent's position that the release includes such a waiver so as to allow a former employer to speak freely without fear of legal retribution, runs counter to the employee protection provisions of the ERA.

Respondent in its Countermotion for Summary Judgment contends that Complainant's refusal to sign the unaltered release form is not a protected activity. In order to protect against a threat from someone inside the company, a comprehensive screening program in accordance with ANSI is required; including the obtaining of signed releases from the individual to obtain the necessary information. Respondent argues that the second paragraph

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of the standard release form (which Complainant struck out) merely releases and discharges Respondent and any organization listed in the first paragraph of the release, furnishing or receiving any information pertaining to the individual "only from any liability or claim resulting from furnishing or receiving such information pursuant to the I authorization." Respondent further argues that:

> the employer should be able to protect itself against any claim arising out of the innocent, but necessary provision or receipt of information. . . Moreover, the release is extremely narrow and only applies to that which flows from the act of turning over records to the Respondent. It does not release anyone from any illegal acts under the ERA or Atomic Energy Act.

I agree with this last argument by Respondent. Complainant has misconstrued the effect of the language of the release. He incorrectly believes that his release would jeopardize any "whistleblower" remedies he may be pursuing against other entities. I totally agree with Respondent's analysis

of the legal effect of the release in question. Moreover it would be against public policy to allow an employer to be relieved of liability under the Act by reason of obtaining an employee's signed release. Complainant had he signed said release, would not have released any of his rights to pursue whistleblower remedies. I thus find that his refusal to sign said unaltered release was not a protected activity under the Act. I further find no merit in Complainant's argument that Respondent had three signed releases which satisfied past ANSI standards. Those three releases did not contain the language which Complainant had refused to sign namely the "release of liability" language. Respondent had a right to require all prospective employees to sign such a release in order to obtain all necessary information pertaining to an individual's post record. Since Complainant refused to accept this requirement I find that this Respondent had a legal right to refuse to employ Complainant. Employers who hire workers for nuclear power plants must ensure the health and safety of the public by carefully screening all prospective employees. This Respondent in requiring all employees including Complainant to sign its release was exercising an essential step in performing its duty of responsible investigation and screening of employees.

In conclusion I recommend to the Secretary of Labor that the Complainant's Motion for Summary Judgment be denied and that an Order and Decision granting Respondent's Motion for Summary Judgment be issued and that the complaint of Shannon T. Doyle should be dismissed.

RICHARD D. MILLS
Administrative Law Judge
Metairie, Louisiana

HYDRO NUCLEAR SERVICES, INC.

1256 N CHURCH STREET MOORESTOWN, NJ 08057
(609) 722-5700

AUTHORIZATION FOR RELEASE OF INFORMATION AND RECORDS

In accordance with the Privacy Act (5U.S.C. 552a), I, the undersigned, expressly authorize any person, association, firm, company, criminal justice agency, Credit Extending Organizations, schools, ILLEGIBLE or Hospitals, Department or agency of a City, County, or State Government, or the Federal Government to release and furnish to Hydro Nuclear Services and its authorized representatives any and all information and records, reports, transcripts, abstracts, military records, criminal records, or any other information.

Further, I hereby release and discharge Hydro Nuclear Services, their representatives, and their clients for whom the investigation is being performed and any organization listed above furnishing or receiving any information pertaining to me from any and all liability or claim as results of furnishing or receiving such information pursuant to this authorization.
Hydro Nuclear Services is authorized to utilize the information it obtains for the purpose of evaluation my eligibility for clearance, allowing unescorted access to Nuclear Power Stations, as required by Government regulations.

A photo copy of this authorization shall be deemed an original and shall be accepted as such by any person or organization.

Name Printed _____
Date_____
Date of Birth_____(Furnished for reasons of positive

I.D.)
Social Security #_____
Present Address_____
How Long_____
Signature_____

SECTION 210 OF THE ENERGY REORGANIZATION ACT

UNITED STATES PUBLIC LAWS
95th Congress - Second Session
Convening January 19, 1978

PL 95-601 (S 2584)
NOVEMBER 6, 1978

42 U.S.C. § 5851 "EMPLOYEE PROTECTION"

(a) No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee),

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other

manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.

(b) (1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (hereinafter in this subsection referred to as the 'Secretary') alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint and the Commission.

(2) (A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

(c) (1) Any person adversely affected or aggrieved by an order issued under subsection (b) may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred. The petition for review must be filed within sixty days from the issuance of the Secretary's order. Review shall conform to chapter 7 of title 5 of the United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the Secretary's order.

(2) An order of the Secretary with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in any criminal or other civil proceeding.

(d) Whenever a person has failed to comply with an order issued under subsection (b) (2), the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory and exemplary damages.

(e) (1) Any person on whose behalf an order was issued under paragraph (2) of subsection (b) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(2) The court, in issuing any final order under this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

(f) Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28 of the United States Code.

(g) Subsection (a) shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this Act or of the Atomic Energy Act of 1954, as amended.

Route 7 Box 254-B
Dothan, Alabama 36301
(205) 677-3686
December 9, 1988

Larry Monk
United States Department of Labor
Wage and Hour Division
100 West Troy Street
Dothan, Alabama 36301

Dear Mr. Monk,

On Sunday, October 30, 1988, I was contacted by a woman from Numanco, a division of Westinghouse which supplies support personnel to nuclear facilities. I was asked if I would be interested in working at the D.C. Cook Nuclear Plant. I informed her that I would be interested and she had me call Mr. Rick McCormick of Hydro Nuclear Services (H.N.S.), another division of Westinghouse, at 1-609-722-5829. Mr. McCormick informed me that he was authorized to offer me $48.00 per diem, .20 per mile transportation each way, and $6.50 per hour as a senior technician. I then asked him if I could get more on the hourly rate and he stated that he would have to get authorization from a manager and that I should talk to him on Monday, October 31.

I contacted Mr. McCormick on Monday and he informed me that $6.50 per hour was the maximum he could offer, but he guaranteed me 72 hours per week. I accepted his offer and he told me to report to Dan Maynes at the plant at 8:00 a.m. on Monday, November 7. When I arrived, Mr. Haynes made arrangements to meet me later that morning in order to reimburse me for my travel and to give me my per diem.

During this meeting Mr. Haynes informed me that I was scheduled for in-process training on Tuesday, November 8. When I inquired as to when I would be going to work, he informed me that he had been informed that my background screen was already on someone's desk in New Jersey and that he thought I would probably go to work Thursday night, November 10. During the next 2 days I completed the training, making 100 % on all four of the tests given, and I passed the standard psychological test. At 11:30 a.m., Wednesday, November 9, I gave a urine specimen for the purpose of drug screening. I contacted Mr. Haynes Thursday morning at 1-616-465-5336, to see if my physical and lung-function test could be performed before going to work that evening. Mr. Haynes then informed me that I had tested positive for a substance on my urine sample. I asked him what the substance was and he informed me that he had been directed not to identify it. I expressed some doubt as to the accuracy of the analysis, and Mr. Haynes stated that further evaluation would be necessary to determine my eligibility for further employment. He also informed me that I would not be paid for any hourly wages from that point in the conversation until the evaluation allowed me to be further employed. I asked him if I would be paid from that point if the test proved negative and he informed me that I would be paid retro-actively if the test was OK. I asked Mr. Haynes how I could find out what the substance was and he directed me to Mr. McCormick.

After several attempts to contact Mr. McCormick leaving messages in vain for him to call me, I was finally able to contact him on Friday, November 11. I asked him to identify the substance and he informed me that he did not know but, would find out. I was put on hold and when Mr. McCormick returned, he told me the substance was THC, the active

ingredient in marijuana. I informed Mr. McCormick that the results were false, as I did not use illegal drugs, nor did I associate with those who did, and that I, the father of 4 school age children, was as opposed to that activity as any father should be. Mr. McCormick expressed a good bit of confidence in the test results and stated that he knew of no previous incidents where they were wrong.

I then questioned the motive of the test results, informing Mr. McCormick of my previous whistle blower status and the extreme difficulty I had experienced in obtaining further nuclear industry employment. I then told him of my intent to have another analysis performed.

I contacted Dr. Richard Jensen's office and arrangements were made for me to be tested in a Chicago medical laboratory. I gave the specimen in the presence of the laboratory director within 52 hours of the first specimen and within 4 hours of Mr. McCormick's finally telling me what the substance was.

On Monday, November 14, I informed Day Haynes that Mr. McCormick had been able to find out what the substance was. Mr. Haynes then informed me that Mr. McCormick knew all along what the substance was because he was the one that directed Mr. Haynes not to give me the information.

I then expressed some concern that I could be incriminated without being told exactly why, and then I informed Mr. Haynes that if the preliminary results of my first drug screen were said to be accurate while the drug screen in Chicago indicated that they were not, then I would have no choice but to file a complaint with the DOL.

On Thursday I received the results of the Chicago drug screen which, as expected were negative. I then called Mr. Haynes and asked if the further evaluation of my first drug-screen had been completed. He informed me that he had no news concerning the matter. He then asked about the Chicago

test and I informed him of the results. I then expressed concerns as to how I could test positive on the high scale of one test yet 2 days later test negative on both the high scale and the low scale.

On Friday, November 18, Mr. Haynes contacted me and told me that after further evaluation my first test was OK, however, I would have to fill out another employment packet because they were unable to locate the original, which included copies of my birth certificate, DD 214, college transcripts and radiation exposure records, that I had submitted previously in order to be offered the job in the first place. I was beginning to wonder if I would ever get into the plant to work. Mr. Haynes reiterated that I would be paid for the time I was waiting for the test results and he would go back and pick me up on the time sheets.

I went to the plant and Mr. Haynes gave me the packet to fill out over the weekend. Included in the material was authorization for release of information and records (enclosure 1). The second paragraph of this document included provisions that I felt would waive my rights to file any blacklisting complaint with the DOL based on information that was received from a former employer. I also realized that f H.N.S. had a change of heart regarding my drug screen, I would have no recourse.

I lined out the highlighted paragraph, signed the document, and returned it along with the completed employment packet on Monday, November 21, at about 7:00 a.m. I was told by Mr. Haynes to return at 11:30 for my per diem payment. When I returned I was asked to sing another copy of enclosure 1 in it's entirety. I expressed reluctance and was told to contact Bob Booker, who was identified as a Westinghouse attorney. At about 12:30, I contacted Mr. Booker at 1-800-556-7572 ext. 5837. He stated that he was unable to discuss the matter at that

time, and would call me back. Dan Haynes then informed me that he had been directed not to pay me my per diem until I signed the document.

Mr. Booker returned my call later that afternoon and I informed him of my hesitance to sign anything that would, in effect, be a waiver of my rights under the Energy Reorganization Act. I informed him of my previous whistle blower status and the difficulties I had experienced in obtaining further nuclear industry employment. I also expressed some concern that I had been at the plant site going into my third week without being granted access.

Mr. Booker inquired as to whether or not I had any intention of taking any action against H.N.S., and I informed him that if I felt I was being discriminated against by anyone because of my protected activities as defined under the ERA, that it was my right to file against that party. I further expressed my opinion that an offer of further employment that was contingent on my waiving that right may be in opposition to the congressional intent expressed by the passage of the employee protection statutes of the Energy Reorganization Act.

I declined to sign the document unless amended. Mr. Booker stated that because of my failure to sign the document in its entirety, they no longer had a position available to offer me. I asked Mr. Booker if he was an attorney and he replied that he was not. I stated that he may wish to consult one and if necessary I could be reached at my home in Alabama. I asked Mr. Booker to see that before I left, I received the monies due me. He stated that he would contact Mr. McCormick to determine what my entitlement were. Within 30 minutes Mr. Haynes exited the plant and informed me that he had been directed not to give me any compensation whatsoever. I then returned to Alabama with very little

money.

I feel that the language of the ERA is very clear in this matter. In short, it states that no employer may discharge an employee because that employee is about to commence a proceeding under the employee protection statute of the ERA.

Furthermore, I feel that Mr. Booker's actions are extremely questionable in that there were the threats of my no longer being employed and withholding compensation due me unless I waived my rights. These threats were carried out.

Even if it is contended that all Westinghouse personnel are required to sign such a "yellow dog" release, I feel that the language of the ERA should supercede such a requirement so as to allow whistle blowers to pursue their rights in order to combat blacklisting tactics.

I request an inquiry be performed.

Sincerely yours,

Shannon T. Doyle

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

June 28, 1995

EA 95-080

Hydro Nuclear Services, Inc.
Moorestown, New Jersey

SUBJECT: NOTICE OF VIOLATION (U.S. Department of Labor Case 89-ERA-022)

Gentlemen:

This refers to the results of an administrative proceeding conducted by the U.S. Department of Labor (DOL) which involved a complaint of employee discrimination filed by an applicant for employment with Hydro Nuclear Services. This complaint was filed under the provisions of Section 210 of the Energy Reorganization Act of 1974, as amended (ERA) (recently changed to Section 211 by the Energy Policy Act of 1992). The DOL proceedings consisted of an investigation, an administrative hearing conducted by a DOL Administrative Law Judge (ALJ) and a final order issued by the Secretary of Labor finding that discrimination occurred in the case. As a result of the DOL proceedings and findings, the Nuclear Regulatory Commission (NRC or Commission) has concluded that a violation of Section 210 and of NRC regulations occurred, specifically a violation of 10 CFR 50.7, which prohibits discrimination against an employee or applicant for

employment for engaging in activities protected by the ERA.

The violation described in the enclosed Notice of Violation (Notice) concerns the findings of discrimination made by the Secretary of Labor in DOL Case No. 89-ERA-022, captioned as Shannon T. Doyle v. Hydro Nuclear Services. In this case, the Secretary found that Hydro Nuclear Services "violated the ERA when it refused to hire Complainant because he refused to sign the authorization form unless the release of liability paragraph was deleted." The Secretary required that Hydro Nuclear Services offer employment to Mr. Doyle as well as back pay with interest.

According to the Secretary of Labor, the form, called an Authorization for Release of Information and Records, would have "released [Hydro] and any other employer from whom [Hydro] obtained information about [Doyle] from any claim that the information had been provided or used to deny [Doyle] employment because of protected activities under the ERA." Saying that "employees may reasonably believe that they have no protection under the ERA and will be afraid to speak out about safety problems," the Secretary concluded that Hydro Nuclear discriminated against Mr. Doyle.

The NRC adopts the final Secretary of Labor decision in this case and finds that a violation of 10 CFR 50.7 occurred when Hydro Nuclear Services refused to hire Mr. Doyle after his refusal to sign a waiver form in his application for employment. Under 10 CFR 50.7, discrimination by a Commission licensee or a contractor of a Commission licensee is prohibited. In accordance with the "General Statement of Policy and Procedure for the NRC Enforcement Actions," (Enforcement Policy), 10 CFR Part 2, Appendix C, the violation has been categorized at Severity Level III.

You are requested to respond to this letter and should follow the instructions specified in the enclosed Notice of

Violation when preparing your response. In your response, you should document the specific actions taken and any additional actions you plan to prevent recurrence. After reviewing your response to this Notice, including your proposed corrective actions and the results of future inspections, the NRC will determine whether further NRC enforcement action is necessary to ensure compliance with NRC regulatory requirements.

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter and its enclosure will be placed in the NRC Public Document Room.

The responses directed by this letter and the enclosed Notice are not subject to the clearance procedures of the Office of Management and Budget as required by the Paperwork Reduction Act of 1980, Pub.L. No. 96-511.

Should you have any questions concerning this letter, please contact us.

Sincerely,

R. Lee Spessard, Director
Division of Technical Support

NOTICE OF VIOLATION

Hydro Nuclear Services
Moorestown, New Jersey EA **95-080**

Based on the results of an investigation and administrative hearings conducted by the U.S. Department of Labor (DOL) related to DOL Case No. 89-ERA- 022 that involved employee discrimination, and the resulting order of the Secretary of Labor dated March 30, 1994, the NRC has determined that a violation of its regulations occurred. In accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions," (Enforcement Policy), 10 CFR Part 2, Appendix C, the violation is listed below:

Section 210 of the Energy Reorganization Act of 1974, as amended, (ERA) and 10 CFR 50.7 prohibit discrimination by a Commission licensee, permittee, an applicant for a Commission license or permit, or a contractor or subcontractor of a Commission licensee, permittee or applicant against an employee for engaging in certain protected activities. Discrimination includes discharge or other actions relating to the compensation, terms, conditions, or privileges of employment.

Contrary to the above, on October 30, 1988, a technician was offered a job by Hydro Nuclear Services at the D.C. Cook Nuclear Plant. The technician accepted the job and was told to report to work at the D.C. Cook plant on November 9, 1988. During employment screening, the technician refused to sign a form that included a paragraph that would have waived his rights under the ERA. The Secretary of Labor concluded that this constituted discrimination in violation of Section 210 of the ERA and ordered that Hydro Nuclear Services offer Mr. Doyle a comparable position and pay back wages with interest.

Severity Level III violation (Supplement VII)

Pursuant to the provisions of 10 CFR 2.201, Hydro Nuclear Services is hereby requested to submit a written statement or explanation to the U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington, DC 20555, with a copy to the Division of Technical Support, Office of Nuclear Reactor Regulation, within 30 days of the date of the letter transmitting this Notice of Violation (Notice). This reply should be clearly marked as a "Reply to a Notice of Violation" and should include for each violation: (1) the reason for the violation or, if contested, the basis for disputing the violation, (2) the corrective steps that have been taken and the results achieved, (3) the corrective steps that will be taken to avoid further violations, and (4) the date when full compliance will be achieved. Where good cause is shown, consideration will be given to extending the response time. Under the authority of Section 182 of the Act, 42 U.S.C. 2232, this response shall be submitted under oath or affirmation.